Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

Human Life of Washington, Inc., *Petitioner*

v.

Chair Bill Brumsickle et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented

Human Life of Washington, Inc. ("HLW") has long opposed physician-assisted suicide ("PAS"). In 2008, public interest in HLW's issue was high as a ballot initiative legalizing PAS was being debated. HLW wanted to express it views on this issue but self-censored because Washington would have deemed it to be a "political committee" ("PAC") – even though it is not HLW's major purpose to support or oppose ballot measures and even though its proposed ads neither mentioned nor expressly advocated the passage or defeat of the initiative—and because of the severe penalties for noncompliance. There are four issues:

1. Whether the PAC definition, Wash. Rev. Code ("RCW") § 42.17.020(39)—and its implementing "*a* primary purpose" and "receiver of contributions" tests—are unconstitutionally vague and overbroad under the First and Fourteenth Amendments, which limit PAC-status to groups with "*the* major purpose" of regulable election-related speech. *Buckley v. Valeo*, 424 U.S. 1 (1976) (emphasis added).

2. Whether the "independent expenditure" definition, RCW § 42.17.100, is unconstitutionally vague and overbroad under the First and Fourteenth Amendments because it lacks a bright-line, speech-protective test.

3. Whether the "political advertising" definition, RCW § 42.17.020(38), is unconstitutionally vague and overbroad under the First and Fourteenth Amendments because it lacks a bright-line, speech-protective test.

4. Whether the reporting requirement for communications containing "a rating, evaluation, endorsement,

or recommendation for or against a candidate or ballot measure," Wash. Admin. Code ("WAC") § 390-16-206, is unconstitutionally vague and overbroad under the First and Fourteenth Amendments because it lacks a bright-line, speech-protective test.

Parties to the Proceeding

Petitioner in this Court (Plaintiff-Appellant below) is Human Life of Washington, Inc.

Respondents in this Court (Defendants-Appellees below) are Chair Bill Brumsickle, Vice-Chair Ken Schellberg; Secretary Dave Seabrook; Jane Noland; Jim Clements, in their Official Capacities as Officers and Members of the Washington State Public Disclosure Commission, and Rob McKenna, in His Official Capacity as Attorney General.

Corporate Disclosure Statement

Human Life of Washington, Inc. is a nonstock corporation with no parent company and no publicly held company owning 10% or more of its stock. Rule 29.6.

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Petition

Human Life of Washington ("HLW") seeks a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit to review its judgment herein.

Opinions Below

The appellate opinion is reprinted in the Appendix ("App.") at 1a and available at __ F.3d __, 2010 WL 3987316 (9th Cir. Oct. 12, 2010). The district court opinion, App. 65a, is unreported but available at 2009 WL 62144 (W.D. Wash. Jan. 8, 2009).

Jurisdiction

Appellate judgment was entered October 12, 2010. This Court has jurisdiction. 28 U.S.C. 1254(1).

Constitutions, Statutes, and Regulations Involved

Appended are: First Amendment (App. 121a); Fourteenth Amendment, Section 1 (App. 121a), RCW 42.17.020(39), App. 122a; RCW 42.17.100(1), App. 122a; RCW 42.17.020(38), App. 121a; Wash. Administrative Code ("WAC") 390-16-206, App. 122a.

Statement of the Case[1]

As a result of this Court's decision in *Citizens United v. FEC*, 130 S.Ct. 876 (2010) ("*Citizens*"), citizens groups, whether incorporated or a labor union, are no longer prohibited from engaging in the full range of independent political advocacy of candidates. While this is a profound change in federal election law,

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[1] The district court had jurisdiction over this case brought under 42 U.S.C. § 1983 and the First and Fourteenth Amendments. 28 U.S.C. §§ 1331, 1343(a)(3), 2201, 2202. The Ninth Circuit had jurisdiction. 28 U.S.C.1291.

its practical implications are still unclear because there remain substantial legal impediments to citizen groups' free speech.

The State of Washington has adopted many of these impediments, targeting independent speech by both groups and individuals for regulation and prohibition. By these vague and overbroad laws, Washington has chilled issue advocacy by groups, by threatening them with PAC-status and punishing them if they fail to register and comply with complex organization-wide disclosure and administrative burdens. And by using vague terms, Washington does not give them fair notice of when PAC-status is triggered.

Of course, before *Citizens*, some groups were already exempt from the corporate and labor union political speech ban, such as *MCFL*-type corporations and unincorporated associations, and some political speech regarding candidates could not be regulated, such as issue-advocacy and grass roots lobbying. So since 1974, Congress and many states have tried to reign in these group's political speech by regulating them as PACs. But this Court has carefully cabined these efforts, in order to protect issue advocacy organizations and to ensure that campaign laws are unambiguously campaign related. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court limited PAC-status to those groups with the major purpose of nominating or electing candidates to public office[2] and, to ensure that

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[2] PAC-status may only be imposed on "organizations . . . *the* major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79 (emphasis added). If PAC-status may be applied in this context, the major-purpose test would only permit it to be imposed on groups with *the* major purpose of *passing or defeating ballot*

groups knew when they were engaged in political activity that might trigger PAC-status, held that only contributions to candidates and express-advocacy communication could be counted. These standards have been consistently reaffirmed by this Court. *See FEC v. Massachusetts Citizens For Life,* 479 U.S. 238, 262 (1986) ("*MCFL*"); *McConnell v FEC*, 540 U.S. 93, 170 (2003); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 488 n.3 (2007) ("*WRTL-II*")

However, these carefully crafted standards for determining PAC-status have been under persistent assault, leading to numerous decisions of the federal courts dealing with this issue. Most recently, the complex federal regulatory scheme for determining PAC-status reached this Court in *Real Truth About Obama v. FEC*, 575 F.3d 342 (4th Cir. 2009) ("*RTAO*"), where Plaintiff claimed that the FEC, through both regulations and their enforcement policy, had subverted this Court's major purpose test and PAC-status triggers, but which the Fourth Circuit had upheld. This Court, however, had just decided *Citizens*, which held that PAC burdens were "onerous" and did not resolve First Amendment concerns about undue regulation of political speech, and which condemned complex and vague multi-factor tests. *Citizens* 130 S.Ct. at 895-96. As a result, this Court vacated and remanded *RTAO* for reconsideration in light of *Citizens*. 130 S.Ct. 2371 (2010).

The court below here, however, thought that *Citizens* cast no negative light on PAC-status, rather that *Citizens* endorsed imposition of PAC-status because it upheld a one-time, event-driven report. So

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initiatives.

despite this Court's vacation and remand of *RTAO*, the Ninth Circuit has taken a different tack, undermining this Court's carefully crafted standards in *Buckley* and inviting wholesale disregard of this Court's important precedent.

Therefore, even if HLW escapes PAC-status, its independent political speech is potentially subject to penalty for failing to comply with certain event-driven reports, which are defined so vaguely that HLW cannot be certain of when they are triggered. They are also overbroad, regulating issue advocacy that is not campaign related.

These are important issues for this Court to decide. The Ninth Circuit's decision conflicts with this Court's precedents and the decisions of other Circuits. Unless reversed, it threatens to deprive groups of the very political speech that this Court sought to protect in *Buckley* through *Citizens*. The petition should granted.

A. Facts[3]

Plaintiff HLW is a nonprofit, pro-life advocacy group that wanted to continue its long-time issue advocacy against physician-assisted suicide ("PAS"), while public interest in it peaked during efforts to qualify and pass Initiative 1000, legalizing PAS in the State of Washington during 2008.[4] Defendants ("Washington") are the members of the Public Disclosure Commission ("PDC") and the Attorney General.

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[3] Facts are verified in the Complaint. App. 124-36a, ¶¶ 1-10, 13-40.

[4] This case is not moot: HLW intends similar future activity and such challenges are capable of repetition yet evade review. *WRTL-II*, 551 U.S. at 462.

HLW wanted to solicit funds for issue-advocacy PAS advertisements. A planned fundraising "Letter" referenced a failed PAS ballot initiative *in 1991* and a failed PAS bill in 2006, but it made *no mention* of I-1000, referring instead to the PAS *issue*:

> [N]ow in 2008 the assisted suicide *issue* is again *on the minds of the people* of Washington. Now, *while their minds are focused* on the *issue*, is the *opportune time to educate* them on the dangers of assisted suicide—and on the value of every life. . . . The public needs to receive this sort of information as assisted suicide advocates once again offer biased, inaccurate, and rosy depictions of this grisly practice. The public needs to know that the answer is love and care at the end of life, not eliminating patients. And people need to be reminded of the importance of patients always being able to trust that physicians will be care givers, not life takers.

App. 148-50a (emphasis added).

A planned fundraising "Phone Script" mentioned efforts "to get an initiative on the ballot this fall that would legalize [PAS]," but it did not expressly advocate for or against any initiative or say it would do so with funds it received, focusing rather on "plan[s] to broadcast . . . advertisements bringing awareness to this issue." App. 151-52a.

Of HLW's four intended ads, only *Settled* mentioned a "ballot measure," but that was a *1991* initiative. *Settled* said "[a]ssisted suicide is back in the news," asked "[d]idn't we settle that issue?," and recited problems with Oregon's PAS experience as "reasons *not* to reconsider the *issue*." *Id.* (second emphasis added). *Slippery* discussed the slippery slope of the Dutch PAS

experience. *Id. Tolerance* discussed why disability groups oppose PAS and the need for "[t]he Hemlock Society's founder" to "be more tolerant—of persons with disabilities." *Id. Trust* recalled the Hippocratic Oath breakthrough—whereby patients could trust doctors—and the danger of turning doctors into killers. *Id.*

So only the Phone Script even mentioned an effort to put a current initiative on the ballot, and no communication expressly advocated for or against it.[5] These communications are "issue advocacy," which "conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *WRTL-II*, 551 U.S. at 470. HLW did not plan to, or solicit funds for doing "express advocacy" of the ballot measure. *See California Pro-Life Council v. Getman*, 328 F.3d 1088, 1096-00 (9th Cir. 2003) ("*CPLC-I*") (upholding "independent expenditure" definition in the ballot-initiative context because it was construed to apply to only express advocacy communications). Washington "den[ied HLW]'s characterization of [its communications as issue advocacy], saying that it "lack[ed] sufficient information . . . to form a belief regarding [HLW]'s *intentions*." *See* Answer ¶¶ 27-29 (emphasis added).[6]

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[5] Washington has asserted no interest in regulating broadcast communications simply referencing initiatives near elections because it has not passed legislation similar to the federal "electioneering communications" provisions. *See* 2 U.S.C. 434(f)(3) (definition).

[6] Washington's forbidden reliance on *intent* to determine

Disbursements for HLW's issue-advocacy communications (even if they are cognizable for the major-purpose analysis) could not have been HLW's major purpose, because they were under 20% of HLW's $180,000 annual budget.

HLW feared Washington would deem it a PAC and penalize it for not complying with PAC requirements. Compl., Count 1.

HLW feared Washington would deem its communications "independent expenditures"—despite no express advocacy—and penalize it for not complying with requirements for making independent expenditures. Compl., Count 2.

HLW feared Washington would deem its communications "political advertising" and penalize it for not complying with requirements for doing political advertising. Compl., Count 3.

HLW feared Washington would deem its communications "a rating, evaluation, endorsement, or recommendation for or against . . . a ballot measure" and penalize it for not complying with requirements for making such communications. Compl., Count 4.

HLW considered Washington's speech burdens unconstitutional and did not intend to comply with them but was chilled from its speech for fear of investigation, enforcement, and penalties.

B. Counts

1. Count 1—"Political Committee"

HLW challenged Washington's PAC-status scheme,

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communications' meaning violates this Court's repudiation of intent-and-effect tests for interpreting communications. *See Buckley*, 424 U.S. at 43.

involving the PAC definition and Washington's (1) "*a* primary purpose" test, *see State v. Dan Evans Campaign Comm.*, 546 P.2d 75, 79 (Wash. 1976); *Evergreen Freedom Found. v. Washington Educ. Ass'n*, 49 P.3d 894, 903 (Wash. App. 2002), and (2) "receiver of contributions" test. *See Evergreen Freedom Found.*, 49 P.3d at 904; 1973 Wash. Att'y Gen. Op. 114 ("'Political committee' means any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition. RCW 42.17.020(39).")

PAC burdens are onerous. PACs must file a prompt "Statement of Organization" appointing a treasurer, providing detailed information about the organization's officers, and stating the ballot proposition or candidate supported or opposed. RCW 42.17.040. PACs file regular reports—some monthly and some weekly—of all of its contributions and expenditures, even those unrelated to any political activity. RCW 42.17.080; RCW 42.17.060. PAC reports must contain the names and addresses of those contributing $25 or more, RCW 42.17.080(3), and also their occupation and employer for contributions over $100. WAC 390-16-034. Contributions received must be deposited into a designated account. RCW 42.17.040. PACs may not accept anonymous contributions over $300. RCW 42.17.060. PACs must keep account books current within five days of any contribution or expenditure and books are available for public inspection. RCW 42.17.080(5). For eight days preceding elections, books must be current within one day and available for viewing by the public from 8:00 a.m. to 8:00 p.m. *Id.* PACs are subject to random "in-depth" audits following elections. PDC, "Political Committees: 2010 Campaign Disclosure Instructions"

("*PAC Manual*") at 10.[7] PACs are stuck with PAC burdens until they dispose of all their assets, cease operation, dissolve, and report doing so in a final report. *Id.* at 58. PAC burdens are substantial: "Treasurers . . . devote many hours to keeping exact records and filing accurate, detailed reports of receipts and expenditures." *Id.* at 1.

HLW challenged Washington's PAC definition as unconstitutional because (1) "expectation" of receiving contributions or making expenditures for political purposes is undefined, vague, and overbroad[8] in

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[7] Available at http://www.pdc.wa.gov/archive/filerassistance/manuals/pdf/2010/2010.Man.Comm.pdf (materially parallels 2008 manual).

[8] "Overbroad" herein refers to both inadequate tailoring and failure to comply with "*Buckley*-overbreadth," which limits government disclosure to activity that is "unambiguously campaign related." *Buckley*, 424 U.S. at 81. *Buckley*-overbreadth examines whether speech regulated is clearly and closely related to Congress's authority to regulate elections, the authority under which government may regulate First Amendment activities to begin with, *Id.* at 13 and n.6 (*citing* U.S. Const. art. I, § 4). *Buckley* employed it as a threshold test before other scrutiny was applied. *Id.* at 39-51, 76-82. It differs from the First Amendment substantial-overbreadth doctrine of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), which strikes facially provisions sweeping in a substantial amount of protected speech. Courts recognizing the unambiguously-campaign-related requirement as this Court's means of cabining governmental speech regulation in the election context include the Fourth Circuit, *North Carolina Right to Life v. Leake*, 525 F.3d 274, 281-83 (4th Cir. 2008) ("*Leake*"), and the Tenth Circuit, *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 676-77 (10th Cir. 2010) ("*NMYO*")

providing a trigger for when PAC burdens are imposed; (2) there is no monetary contribution or expenditure trigger, *cf.* 2 U.S.C. 431(4) ($1,000 trigger), which lack enhances vagueness and overbreadth; (3) "contributions" is vague and overbroad, not following this Court's construction, *Buckley*, 424 U.S. at 23 n.24; (4) "expenditures" is vague and overbroad, not following this Court's construction, *id.* at 44, 80; *MCFL*, 479 U.S. at 249; (5) "in support of, or opposition to" is vague and overbroad; and (6) the definition lacks the necessary "the major purpose" requirement to be a PAC. *Buckley*, 424 U.S. at 79.

HLW also challenged Washington's "*a* primary purpose" test for imposing PAC-status, *see, e.g.*, PDC Interpretation 07-02 ("'Primary Purpose' Guidelines") (available at http://www.pdc.wa.gov/archive/guide/pdf/Interp0702.pdf), as vague and overbroad for not following this Court's "the major purpose" test.

In addition, HLW challenged Washington's "receiver of contributions" test for imposing PAC-status as vague and overbroad because it also does not follow this Court's "the major purpose" test.

2. Counts 2-4

HLW also challenged three additional provisions as unconstitutionally vague and overbroad: first, the definition of "independent expenditure" as "any expenditure . . . made *in support of or in opposition to* any candidate or *ballot proposition* and is not otherwise required to be reported," RCW 42.17.100 (emphasis added); second, the definition of "political advertising," as "any advertising . . . mass communication, used *for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign*," RCW 42.17.020(37) (emphasis

added); and third, the regulation of "[a]ny person making a measurable expenditure of funds to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition . . . ." WAC 390-16-206.

C. Litigation

On April 16, 2008, HLW filed its Verified Complaint and moved for preliminary injunction, which was denied. On August 7, HLW moved for summary judgment. Briefing was completed August 29, but the court did not hold the requested expedited hearing. On November 4, Washington voters enacted I-1000, without HLW ever being able to do its issue advocacy. On January 8, 2009, summary judgment was denied. Defendants had not cross-moved for summary judgment, so on January 16 HLW moved for judgment to allow it to appeal. On January 23, judgment for Defendants was entered disposing of all issues and dismissing the action with prejudice.

On October 12, 2010, the Ninth Circuit affirmed the district court. Regarding the PAC definition, it held that after *Citizens*, PAC-style burdens are mere "disclosure" subject to "exacting scrutiny," that this Court's "*the* major purpose" test for PAC-status is satisfied by "*a* major purpose," and that the definition survives exacting scrutiny. App. 20a. Of the several vagueness and overbreadth challenges to terms used in the PAC definition, it only addressed "expectation," ignoring challenges to "expenditure," "contribution," and the statutory support/oppose test. App. 56-58a.

Regarding challenges to "independent expenditure," "political advertising," "a rating, evaluation, endorsement, or recommendation," it again ignored vagueness and overbreadth challenges—except for "mass commu-

nication" in the "political advertising" definition—treating the sole issue as whether issue advocacy ("physician-assisted suicide is bad policy") without any express advocacy ("vote against Initiative 1000") could be subject to disclosure. App. 44-45a. It held that the two were essentially the same in the ballot-initiative context, App. 46-48a, and that since *Citizens* permitted disclosure as to issue advocacy under the "electioneering communication" definition, 130 S.Ct. at 915, Washington could require it under its tests. App. 48-49a.

Reasons to Grant the Petition

The petition should be granted because the decision below conflicts with decisions of this Court and other federal appellate courts on four important questions of federal constitutional law. Rule 10. These four questions ask (I & II) on what groups and under what standards may PAC-status be imposed, (III) what disclosure burdens may be imposed to meet the government's informational interest, and (IV) what clarity standards govern definitions regulating core political speech?

These questions are vitally important because this Court's recent campaign-finance decisions are being viewed as carte blanche for heavy burdens on free speech in the name of "mere disclosure," ignoring important holdings of this Court limiting the application of these burdens, and because this Court's prior speech-protective standards are being ignored. Consequently, free speech and association are being chilled. That HLW was chilled, when an issue central to its mission was in public debate, is a prime example.

Current Campaign Finance Jurisprudence Is Not Working.

Two previous Ninth Circuit decisions on which this Court denied review are being cited as authority for lowered protection of issue advocacy and issue-advocacy groups. If this case is also denied review, free speech and association will be further chilled.

In *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987), the Ninth Circuit decided that this Court's magic-words express-advocacy test—established to narrow "expenditure" for disclosure, prohibition, and PAC-status-trigger purposes, *Buckley*, 424 U.S. at 44 & n.52, 80; *MCFL*, 479 U.S. at 249—could be replaced by a vague multi-factor test. States and the FEC have since recited *Furgatch* as authority for tests regulating speech that are neither brightline nor speech-protective—such as the "independent expenditure" test at issue here, and the FEC's "express advocacy" definition at 2 U.S.C. 100.22(b), which was brought to this Court. *RTAO*, 575 F.3d 342, *cert. granted, judgment vacated, and case remanded for reconsideration in light of Citizens*, 130 S.Ct. 2371 (2010).

In *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006) ("*ARTLC*"), *cert. denied*, 549 U.S. 886, the Ninth Circuit decided that PAC-style burdens are not onerous (even when applied to an *MCFL*-corporation that should be free of PAC status and burdens under *MCFL*, 479 U.S. at 263). *ARTLC* is also being cited, as in the present case, as authority to impose PAC-style burdens to satisfy a mere informational interest that could be satisfied with simple

disclaimers and a one-time, event-driven report.[9]

If a writ of certiorari were denied in the present case, *HLW* would be considered as endorsing the view that *Citizens* is carte blanche for layer-on-layer of organization-wide disclosure and other administrative burdens under a complaisant scrutiny that rejects little, if anything, a state might impose in the name of disclosure.[10] Enough is enough. This Court should accept this case to clarify that the only thing subject to exacting scrutiny in *Citizens* was the simple disclaimers and one-time, event-driven reports *Citizens* left in place for electioneering communications, 130 S.Ct. at 914, not the PAC-style burdens *Citizens* pronounced "onerous" and reviewed under strict scrutiny, *id.* at 895-96. Review should be granted to clarify and standardize the sort of disclosure permitted and other administrative burdens imposed, so that states will not suppress core political speech and association in the name of disclosure.

The Decision Below Involves Four Important Federal Questions.

I. Is PAC-Status Still Determined by *Buckley*'s "*the* Major Purpose" Test?

HLW wanted to oppose PAS in communications to

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[9] This case arises in the ballot-initiative context, where only informational interests, not corruption interests, are involved.

[10] *WRTL-II* rejected "a prophylaxis-upon-prophylaxis approach," 551 U.S. at 479 (principal opinion), and the PAC-style use of ongoing reporting (in the absence of ongoing activity) to satisfy the informational interest should not survive even intermediate scrutiny because one-time reports sufficiently meet the informational interest.

Washington voters that would not constitute its major purpose, even if one counts issue advocacy, as well as express advocacy, in determining PAC-status, without becoming a PAC. Its fear was that Washington would deem it a PAC for its activity, subject to multiple disclosure and administrative burdens. That this fear was reasonable has been borne out in this litigation. Washington recited numerous facts that are not cognizable for determining PAC-status—such as the fact that *in 1991* HLW had expressly advocated against a PAS ballot initiative and the fact that HLW's *PAC* had expressly advocated against I-1000—in arguing that HLW should have been treated as a PAC if it had proceeded with its activities. Br. Appellees 8-11, 49 n.38. The Ninth Circuit likewise recited *1991* HLW activity, activity by HLW's *PAC*, a *single* 2008 HLW *email* expressly advocating against I-1000, and HLW's "planned educational campaign," App. 3-6a, before determining that HLW's "fear . . . is well founded." App. 17a.[11]

This raises the first vital question: May PAC-status only be imposed on groups having *the* major purpose of

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[11] The reliance below on the proximity of planned HLW's issue advocacy to a vote on I-1000 is inconsistent with *WRTL-II*'s refusal to consider proximity to the election to determine the meaning of WRTL's ads, 551 U.S. at 473 (principal opinion) ("a group can certainly choose to run an issue ad to coincide with public interest"), 472 (rejecting contextual factors and timing as means of determining interpretation of issue ads), because interpretation of communications must be based on the content of the ads themselves. *Id.* at 469 ("focusing on the substance of the communication rather than amorphous considerations of intent and effect").

regulable campaign advocacy or also on groups with *a* major purpose of regulable campaign advocacy?[12]

A. The Decision Below Conflicts with this Court.

This Court requires *the* major purpose. In construing what "expenditures" might be subjected to disclosure (under a vague and overbroad definition regulating expenditures "for the purpose of influencing . . . elections"), *Buckley* adopted the lower courts' construction of "political committee" as limited to

> organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

424 U.S. at 79. As to disclosure of expenditures by non-PAC entities, *Buckley* construed "expenditure" to apply only to express-advocacy communications to avoid the disclosure being "overbroad" by snaring information that is "too remote" because it is not "unambiguously related to the campaign of a particular federal candidate." *Id.* at 79-80.

Ten years later, this Court, in *MCFL* restated the major-purpose test thrice. First, it noted that requiring MCFL to use a separate segregated fund ("PAC") meant that "all MCFL independent expenditure[13]

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[12] What properly may be considered "regulable campaign advocacy" is considered in Part II.

[13] Under federal law, "independent expenditures" are communications "expressly advocating the election or defeat

activity is . . . regulated as though the organization's major purpose is to further the election of candidates." 479 U.S. at 253 (plurality opinion) (emphasis added). Second, in response to FEC concerns that not forcing MCFL's independent expenditures to be done by a PAC "would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending," this Court responded that the regular one-time, event-driven reporting required for those making independent expenditures and receiving contributions for the purpose of making independent expenditures was sufficient to meet the informational interest. *Id.* It concluded that "[t]he state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act." *Id.* at 262.[14] Then it added: " Furthermore, should MCFL's independent spending become so extensive that *the organization's major purpose* may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* (emphasis added). Third, it reiterated this test: "As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose *primary objective is to influence political campaigns*." *Id.* (emphasis added).

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of a clearly identified candidate" that are not coordinated with a candidate, so as to be treated as contributions. 2 U.S.C. 431(17).

[14] "[L]ess restrictive means" indicates that strict scrutiny applied to requiring PAC-status, as does the requirement of a "compelling" interest. *Id.* at 256 ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest.").

In *McConnell*, 540 U.S. 93, the Court again quoted the major-purpose test from *Buckley* and relied on it in its analysis, *id.* at 170 n.64,[15] thereby "implicitly endors[ing] the major purpose framework." FEC, "Political Committee Status," 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

This major-purpose test is constitutionally mandated and governs whether any group that otherwise meets the statutory "political committee" definition[16] may actually be subjected to PAC-status and burdens. 72 Fed. Reg. at 5597 (stating that *Buckley* and *MCFL* "deemed this [test] necessary to avoid regulation of activity 'encompassing both issue discussion and advocacy of a political result'"). And the test examines "*the* major purpose," not *a* major purpose, of an organization. *Id.* at 5601 (emphasis added).

This Court's "*the* major purpose" test is important in protecting speech because (a) imposing these "onerous" disclosure and other administrative burdens on groups is constitutionally justified only if the groups are, "by definition . . . campaign related." *Buckley*, 424 U.S. at 79, and (b) it is a brightline test under which it is easily determined which groups may be deemed PACs (when proper standards are used in determining "major purpose") without burdensome, intrusive

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[15] *MCFL* set out two ways for determining major purpose of an entity, *see MCFL*, 479 U.S. at 252 n. 6, 262. Both ways indicate that it is *the*, not *a*, major purpose that is required.

[16] Federal law defines "political committee" as "any . . . group . . . receiv[ing] contributions . . . in excess of $1,000 . . . a . . . year or . . . mak[ing] expenditures . . . in excess of $1,000 . . . a . . . year." 2 U.S.C. 431(4)(A).

investigations of groups simply engaging in constitutionally protected speech and association.[17]

In *Citizens*, this Court surveyed the same sort of PAC-style burdens that are imposed on Washington PACs and declared them "onerous."130 S.Ct. at 898. The *Citizens* "onerous" list included organization-wide disclosure and other administrative burdens, but *excluded* the source-and-amount limitations imposed on PACs under federal law. *Id.* at 897. Thus, the *Citizens* "onerous" list and Washington's is nearly identical. This is significant because the decision below relied at several points on *ARTLC*, which held that Alaska could impose PAC-status because Alaska's PAC burdens were "not particularly onerous" because they lacked the source-and-amount limitation of federal law. 441 F.3d at 791.

B. The Decision Below Creates a Circuit Split.

The Second, Seventh, Tenth, Eleventh, and D.C. Circuits have recognized this Court's "*the* major purpose" test, albeit with varying degrees of precision.[18]

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[17] The decision below insisted that Washington's "*a* primary purpose" test was adequate because it "ensures that the electorate has information about groups that make political advocacy a *priority*, without sweeping into its purview groups that only *incidentally* engage in such advocacy" (App. 37a (emphasis added)), ignoring the fact that "priority" and "incidental" are as imprecise as "a major purpose" in imposing onerous burdens in an area where bright lines are required to prevent chilling speech.

[18] *United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141-42 (2d Cir. 1972); *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503,

The Fourth and Ninth Circuits have engaged in the full analysis of distinguishing between "*the* major purpose" and "*a* major purpose," with the Fourth Circuit explaining that major purpose is determined as "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at 287; *see also North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000) ("major purpose" must be "engaging in *express advocacy*" (emphasis in original)), and with the Ninth Circuit previously deciding in *California Pro-Life Counsel v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) ("*CPLC-II*"), that PAC-status could not be imposed on groups like CPLC that lacked the major purpose of qualifying and passing ballot initiatives. 507 F.3d at 1177.

The Ninth Circuit expressly recognized the circuit split it created.[19] So, despite the holdings of this Court and other circuits requiring *the* major purpose of regulable campaign-related speech for imposed PAC-

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505 n.5 (7th Cir. 1998); *Colorado Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1153-54 (10th Cir. 2007) ("*CRLC*"); *NMYO*, 611 F.3d 669, 677 (10th Cir. 2010); *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982); *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010); *FEC v. Machinists Non-partisan Political League*, 655 F.2d 380, 392 (D.C. Cir.1981), *cert. denied*, 454 U.S. 897 (1981); *FEC v. EMILY's List*, 581 F.3d 1, 16 n.15 (D.C. Cir. 2009).

[19] "The Fourth Circuit has adopted [HLW]'s view . . . We disagree . . . ." App. 34a. As to *CPLC-II*, the panel held that it was vitiated by *Citizens*, ignoring *Citizens*'s condemnation of the PAC alternative. App. 41-42a. *ARTLC* is actually the Ninth Circuit holding vitiated by *Citizens*, not *CPLC-II*.

status, the Ninth Circuit upheld Washington's "*a* primary purpose" test for PAC-status. App. 37a. It held that "what is constitutionally significant" is "the word 'primary'—not the words 'a' or 'the,'" though it then declared that "we do not hold that the word 'primary' or its equivalent is constitutionally necessary." App. 37a.[20] Thus, a group might have "several primary purposes," with only one being regulable campaign activity, and yet be deemed a PAC. App. 38a. The decision below argued that, under a test examining *the* major purpose, an organization with a large budget could spend larger amounts for "political advocacy" without PAC burdens than could a small organization. App. 38a. But the Ninth Circuit's analysis ignores the facts that (1) PAC-status is based on the *nature* of the organization (its major purpose makes it, "by definition, campaign related," *Buckley*, 424 U.S. at 79), not the *amount* of its expenditures; (2) disclosure of properly defined contributions and expenditures occurs regardless of PAC-status (because there are required disclaimers and one-time, event-driven reports); and (3) in any event, the sort of issue advocacy at issue here is non-cognizable for determining PAC-status (because it is not "regulable, election-related speech," *Leake*, 525 F.3d at 287).

Whether PAC-status and the attendant onerous disclosure and administrative burdens may only be imposed on groups having *the* major purpose of regulable, election-related speech is a vital question of federal law regarding which there is a conflict in the

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[20] Thus, the Ninth Circuit seems to say that a group might even be deemed a PAC for merely having "a purpose" of campaign advocacy, which is far afield from this Court's "the major purpose" test.

Circuits and which has resulted in considerable confusion among the lower courts.[21] This petition should be granted to reaffirm that this Court meant what it said in *Buckley* when it chose the words "the major purpose" in construing which groups could be subject to PAC-style burdens but approving disclosure of expenditures by one-time, event-driven reports. 424 U.S. at 79-80.[22]

II. Is "Major Purpose" Based on "Regulable, Election-Related Speech"?

Washington construes its PAC definition to require at least "a major purpose," but how does it determine "major purpose"? Washington recited facts from *1991* and things HLW's *PAC* did in an attempt to portray HLW as "political," Br. Appellees 8-11, 49 n.38, as did the Ninth Circuit, App. 3-6a, but such facts have nothing to do with HLW's *own* status in *2008*. The Ninth Circuit pointed to a single express-advocacy email from HLW to supporters, App. 3-4a, though Washington does not regulate emails as "expenditures," *see* PDC, "Campaign Activities on the Internet,"

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[21] This confusion has been evident in the last few weeks, as district courts have issued vastly different rulings on the impact of the major-purpose test. *Compare, e.g., Iowa Right to Life v. Smithson*, 2010 WL 4277715, at *14 (S.D. Iowa, Oct. 20, 2010) ("the Court reads no such [major-purpose] "mandate" in *Buckley*) *with National Organization for Marriage, Inc. v. Roberts*, No. 1:10-cv-00192 at 11 (N.D. Fla, Nov. 8, 2010) (recognizing the major-purpose test for political-committee status).

[22] *Buckley*'s creation of the major-purpose test in the context of discussing expenditure *disclosure* indicates that the test is not limited to the *prohibition* context, and its concern about "encompassing both issue discussion and advocacy of a political result" clearly applies here.

PDC Interpretation 07-04 (Oct. 25, 2007), making it non-cognizable for PAC-status, and, in any event, the cost of a single email is de minimus and could not establish even *a* primary purpose.

Washington's PAC definition provides no better guidance in determining "major purpose." It speaks of "contributions" and "expenditures," without the constructions given those terms in *Buckley*.[23] It triggers PAC-status on "having the *expectation* of receiving *contributions* or making *expenditures* in *support* of, or *opposition* to, any candidate or any ballot proposition." RCW 42.17.020(39) (emphasis added). The italicized terms are unconstitutionally vague and overbroad. And it lacks the monetary trigger of *actual* "contributions" or "expenditures," which the federal definition contains, and has been construed to encompass activities decades before, which heightens the vagueness and overbreadth.

This raises the second vital question requiring this Court's decision: Must "major purpose" (PAC-status) be determined only as "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at

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[23] *Buckley* construed "contribution" as "[f]unds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary . . . . In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act." 424 U.S. at 23 n.24. "[F]or political purposes" clearly meant "for regulable contributions and expenditures," as those terms were construed in *Buckley*. "Expenditure" was construed to require magic-words express advocacy. *Id.* at 44 (prohibition context), 80 (disclosure context).

287—including only "expenditures" and "contributions," during a single year, *Buckley*, 424 U.S. at 39-44, 79-80—or may PAC-status be determined on a vague, overbroad support/oppose test?[24]

A. The Decision Below Conflicts with this Court.

Buckley required that a group's "major purpose" be "nominating or electing candidates" before PAC burdens could be imposed. *Id.* at 79. *Buckley* expressly rejected any vague "intent and . . . effect" approach to regulating core political speech, *id.* at 43, so the regulable activities that could have been considered in determining major purpose would have been narrowly construed "contributions" and "expenditures." *See id.* at 23 n. 24, 44, 80.

In *MCFL*, this Court identified two objective ways of determining "major purpose," as explained by the Tenth Circuit:

> In *MCFL*, the Court suggested two methods to determine an organization's "major purpose": (1) examination of the organization's central organizational purpose; or (2) comparison of the or-

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[24] This Court upheld a support/oppose test in *McConnell*, but made the point that it was not vague because it applied to entities that were *already* political committees, whose activities were *presumed* to be campaign related. 540 U.S. at 170 n.64. The same cannot be said of a test to decide *whether* a group is a "political committee," as here, or else presumptions *flowing from* political status are employed to *determine* PAC-status. In determining PAC-status and in construing definitions of "contributions" and "expenditures" by *non*-political committees, this Court has required bright-line tests.

> ganization's independent spending with overall spending to determine whether the preponderance of expenditures are for express advocacy or contributions to candidates. 479 U.S. at 252 n. 6 (noting that MCFL's "central organizational purpose [wa]s issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates"); *see id.* at 262 (noting that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee").

CRLC, 498 F.3d at 1152.[25] The cited "independent spending" at issue in *MCFL* was magic-words express advocacy. *See MCFL*, 479 U.S. at 249.

B. The Decision Below Creates a Circuit Split.

In addition to conflicting with the Tenth Circuit's decision in *CRLC*,[26] the decision below conflicts with decisions of the Fourth Circuit. The Fourth Circuit succinctly held that major purpose "is best understood as an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," *Leake*, 525 F.3d at 287 (emphasis added). That approach would examine how much an advocacy group spends on express-advocacy "independent expenditures" and contributions to candidates compared to its

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[25] This formulation was restated in 2010 in *NMYO*, 611 F.3d at 677.

[26] *See also Alliance for Colorado's Families v. Gilbert*, 172 P.3d 964 (Colo. Ct. App. 2007) (recognizing test and remanding for administrative law judge to determine group's major purpose).

total disbursements in a particular year to determine if the group was a "political committee" for that year.[27] If over fifty percent of a group's expenditures were for express advocacy and for properly defined "contributions," then the major purpose of the group would be "nominating or electing candidates," *Buckley*, 424 U.S. at 79, and PAC-status could be imposed. There would be no examination of non-regulable speech or other factors. *See also Bartlett*, 168 F.3d at 712.

The Ninth Circuit, however, declined to recognize that major purpose must be determined "as an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at 287, instead deciding that the support/oppose test and the PAC definition containing undefined "expectations" and vague terms such as "contribution," and "expenditure" were adequate and citing to non-cognizable activity to determine HLW's major purpose. App. 34-37, 61-62a.

How "major purpose" is determined is a vital question of federal law that this and other courts have resolved differently than the decision below. This petition should be granted to reaffirm that only regulable, election-related speech may be considered in determining "the major purpose" of a group for the purpose of imposing PAC-status and PAC-style burdens.

III. Did *Citizens* Approve "Onerous" PAC-Style Disclosure Under "Exacting Scrutiny"?

The decision below relied on *Citizens*, 130 S.Ct. 876,

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[27] *See also FEC v. GOPAC*, 917 F. Supp. 851, 852 (D.D.C. 1996) (PAC-status determination done by particular year).

as authority for treating PAC-status and PAC-style burdens as "mere disclosure" subject to complaisant "exacting scrutiny," App. 24a, under which it held that the only consideration was "whether the law's requirements are substantially related to a sufficiently important governmental interest." App. 25a. It readily found an informational interest sufficient, App. 25-31a, decided that PAC-style burdens were not particularly onerous under exacting scrutiny, App. 40-44a, and held that the "modest political committee disclosure requirements are substantially related to the government's interest in informing the electorate." App. 44a.

This raises the third vital question requiring this Court's decision: Was *Citizens*, 130 S.Ct. 876, carte blanche for imposing—in the name of "mere disclosure" and under complaisant scrutiny—the PAC-style organization-wide disclosure and other administrative burdens that *Citizens* rejected as "onerous" and which could not be imposed on groups not properly PACs, *id.* at 898, when the informational interest could be met under the a simple federal-style scheme of disclaimers and one-time, event-driven reports that *Citizens* left in place for electioneering communications?

A..The Decision Below Conflicts with this Court.

The answers to four corollary questions demonstrates the conflict between the decisions of this Court and the Ninth Circuit. First, has this Court viewed PAC-style burdens as onerous or modest? Clearly the sort of burdens at issue here have long been considered onerous. *MCFL* considered them onerous. It examined two kinds of burdens (divided into two groups by the word "[f]urthermore," 479 U.S. at 254-55) with the first group being the sort at issue here. That group included

"[d]etailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records." *Id.* at 254. The plurality said that such burdens "impose administrative costs that many small entities may be unable to bear" and "such duties require a far more complex and formalized organization than many small groups could manage." *Id.* at 254-55. Only *after* these PAC-style burdens were thus pronounced onerous did the discussion turn to source limitations. *Id.* at 255. So even *absent* source-and-amount restrictions, PAC-style burdens were found onerous in *MCFL*.[28] Justice O'Connor concurred that "the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act." *Id.* at 266.

Furthermore, the principal opinion in *WRTL II* agreed that "PACs impose well-documented and onerous burdens, particularly on small nonprofits." 551 U.S. at 477 n.9 (Roberts, C.J., joined by Alito, J.) (*citing MCFL*, 479 U.S. at 253-255 (plurality opinion)). And *Citizens* listed the PAC-style burdens at issue here, with no mention of source-and-amount limitations, and pronounced these precise burdens "onerous." 130 S.Ct. at 898.

So for the Ninth Circuit to pronounce these PAC-style burdens "not particularly onerous" in *ARTLC*, 441 F.3d at 791, and "somewhat modest" in the decision below, App. 44a, conflicts with the decisions of this

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[28] And *MCFL* explicitly said that the fact that MCFL had a *PAC* did not alter the analysis, 479 U.S. at 255 n.8, which vitiates the Ninth Circuit's argument to the contrary with regard to HLW. App. 40a.

Court.[29]

Second, what standard of review has this Court applied to PAC-style burdens? In *MCFL*, this Court applied strict scrutiny to the determination of whether PAC-status could be imposed on an *MCFL*-corporation. This is particularly evident in its holding that the less-restrictive means of simple one-time, event-driven, independent-expenditure reports for groups that were not properly PACs adequately met the government's informational interest. 479 U.S. at 262. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *overruled on other grounds*, *Citizens*, 130 S.Ct. 876, this Court also held that strict scrutiny applied to imposed PAC-style burdens. 494 U.S. at 658 ("Although these requirements do not stifle corporate speech entirely, they do burden expressive activity. Thus, they must be justified by a compelling state interest." (*citing MCFL* plurality and concurring opinions)).

It is not enough to say that *MCFL* and *Citizens* involved a prohibition and the present one does not, as the Ninth Circuit did, App. 21-25a, because both *MCFL* and *Citizens* directly applied strict scrutiny to their analysis of the PAC-style burdens, not just the prohibition. *Citizens* directly addressed the government's argument that there really was *no* prohibition because the PAC-option was available. 130 S.Ct. at

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[29] And the Ninth Circuit's view that Washington's PAC-style scheme is "not unduly onerous," App. 43a, is contradicted by Washington's own *PAC Manual*, which declares that "[t]reasurers for most political committee[s] . . . will have to devote many hours to keeping exact records and filing accurate, detailed reports of receipts and expenditures." App.138a ¶ 44.

897. Consequently, *Citizens* evaluated the PAC-style burdens as if there *were* no prohibition. *Citizens* evaluated them under strict scrutiny to see if the PAC-option adequately protected First Amendment rights, holding that it did not. *Id.* at 897-99. If PAC-style burdens don't protect First Amendment rights as the only option because of a prohibition, then they don't protect the group's rights as the only option because the same "onerous" burdens have been imposed in the name of "mere disclosure." In other words, if a prohibition is eliminated but the same onerous PAC-style burdens remain—or a nearly identical subset—the same scrutiny that originally applied should yet be applied to this effort to circumvent the holding that such burdens unduly undermine First Amendment rights.

Third, even if "exacting scrutiny" applies to PAC-style burdens, as the Ninth Circuit held, App. 24-25a, would it be complaisant or high exacting scrutiny? *Buckley* called "exacting scrutiny" the "strict test" and employed it as a non-complaisant test. 424 U.S. at 66. In *Davis v. FEC*, 128 S.Ct. 2759 (2008), this Court held that, under "exacting scrutiny," "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* at 2775. Here the burdens are serious. So even assuming *arguendo* that *Citizens* imposed "exacting scrutiny" on PAC-style burdens, it would have to be a demanding exacting scrutiny—the functional equivalent of strict scrutiny, which the Ninth Circuit did not apply.

Fourth, what sort of disclosure did *Citizens* leave in place for electioneering communications? *Citizens* upheld federally-defined disclosure reports for communications meeting the federal "electioneering communi-

cation" definition (as opposed to disclosure only for those meeting *WRTL-II*'s appeal-to-vote test, *WRTL-II*, 551 U.S. at 451). Electioneering-communication disclosure requires a simple disclaimer, 2 U.S.C. § 441d, and simple, one-time, event-driven report when the cost of the broadcast ads exceed $10,000 (per calendar year) upon which a *single* statement is filed identifying the payor (and its accounts custodian and principal place of business, if not an individual), anyone else sharing control over the disbursements, itemized disbursements over $200 for electioneering communications, the election and candidate identified, and the names of persons donating $1,000 or more for the purpose of making electioneering communications. 2 U.S.C. 431(f)(1)-(2). This is not organization-wide, *PAC-style* reporting of the sort declared onerous in *Citizens*, and this Court's exacting scrutiny of the simple disclosure scheme is not warrant for complaisant scrutiny of the PAC-style burdens to which this Court has applied strict scrutiny.

The answers to these four corollary questions reveal that *Citizens* is not carte blanche for PAC-style burdens under complaisant exacting scrutiny for groups not properly PACs. PAC-style burdens are inherently onerous because they go beyond satisfying a mere informational interest and treat as PACs groups whose focus is issue advocacy.

B. The Decision Below Creates a Circuit Split.

The decision below creates a circuit split with both the Fourth and the Tenth Circuits on the level of scrutiny to be applied. In *Leake*, the Fourth Circuit applied a "high bar . . . developed in the strict-scrutiny context," to review all provisions, including standards for imposing PAC-status. 525 F.3d at 311 (Michael, J.,

dissenting). The Tenth Circuit in *CRLC*, 498 F.3d at 1146, did likewise.[30]

The decision below also creates an intra-circuit split in the Ninth Circuit since prior decisions have applied strict scrutiny to PAC-style burdens in the ballot-initiative context, *CPLC-I*, 328 F.3d at 1101 n.16, and *CPLC-II*, 507 F.3d at 1177-78, decisions that the court below erroneously asserted were effectively overruled by *Citizens*. App. 41-42a.

Whether *Citizens* was carte blanche for imposing, under complaisant scrutiny, PAC-style burdens that *Citizens* rejected as "onerous" is a vital question of federal law that this and other courts have resolved differently than the decision below. This petition should be granted to reaffirm that PAC-style burdens are reviewed under strict scrutiny and may only be imposed on groups having the major purpose of regulable, election-related speech.

IV. Do this Court's High Standards for Definitions and Tests Regulating Speech Survive?

HLW challenged, as unconstitutionally vague and overbroad, terminology in Washington's PAC definition in Count 1; the definitions of "independent expenditure" (Count 2, challenging "in support of or in opposition to any candidate or ballot proposition") and

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[30] The Tenth Circuit, using exactly scrutiny, recently found Colorado's campaign-disclosure statutes unconstitutional as applied to a ballot-issue committee that raised less than $1,000. *Sampson v. Buescher*, 2010 WL 4456970 (10th Cir. Nov. 9, 2010). Exacting scrutiny was appropriate because the political committee definition was not at issue since the major purpose test was satisfied. The court was evaluating the disclosure burdens.

"political advertising" (Count 3, challenging "for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign" and "mass communication"); and regulation of a "rating, evaluation, [or] endorsement" (Count 4, challenging the stated terms as well as "for or against a candidate or ballot proposition"). The decision below rejected all of the vagueness and overbreadth challenges it considered, App. 55-60a—it did not discuss some—though the challenged language is like terminology this Court has already rejected.

This raises the fourth vital question requiring this Court's decision: Are the high vagueness and overbreadth standards and bright, speech-protective tests of *Buckley*, 424 U.S. 1, and *MCFL*, 479 U.S. 238, now abandoned so that states may regulate speech under vague terminology comparable to that previously rejected by this Court?

A. The Decision Below Is in Conflict Decisions of this Court.

This Court has historically been highly protective of the people's issue advocacy by requiring bright-line tests: "'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'" *Buckley*, 424 U.S. at 41 n.48 (citation omitted). "The test is whether the language of [the challenged provision] affords the '(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms.'" *Id.* at 41 (citation omitted). This Court has specifically found vague and overbroad the operative phrases "relative to a clearly identified candidate," *id.* at 39-44; "for the purpose of . . . influencing the nomination or election of candidates," *id.* at 23 n.24, 76-81;

"'advocating the election or defeat of' a candidate," *id.* at 42; and "in connection with any election," *MCFL*, 479 U.S. at 248-49; including in *disclosure* contexts. In particular, *Buckley* required that disclosure of "expenditures" be limited to magic-words, express-advocacy communications. 479 U.S. at 80. While *Citizens* approved extending disclosure to all federally defined "electioneering communications,"130 S.Ct. at 913-14, that definition has a very bright line,[31] and so *Citizens* does not serve as justification for regulating issue advocacy under vaguer terminology.

B. The Decision Below Is in Conflict with Other Circuits.

The decision below expressly noted a circuit split with the Fourth Circuit, App. 34a, where the Fourth Circuit had held that the only two regulable communications are federally defined "independent expenditures" and "electioneering communications," because those strike the right "balance" between liberty and governmental authority to regulate elections. *Leake*, 525 F.3d at 284.

Whether this Court's high vagueness and overbreadth standards and bright, speech-protective tests govern speech in this area is a vital question that this and other courts have resolved differently than the decision below. This petition should be granted to reaffirm that speech regulations require bright, speech-protective definitional lines and tests.

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[31] Electioneering communications are essentially broadcast ads clearly identifying candidates in 30- and 60-day periods before primaries and general elections. 2 U.S.C. 431(4)(3).

Conclusion

The decision below upheld PAC-style burdens because it pronounced them "modest." App. 44a, 61a. Yet those "modest" burdens chilled HLW's speech. This Court has recognized the danger of creeping, incremental, free-speech encroachments presented as "modest":

> Our pursuit of other governmental ends . . . may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the *modest* diminution of speech as we are against its sweeping restriction.

MCFL, 479 U.S. at 264-65 (emphasis added). This Court's vigilance is again required. For reasons stated, the petition should be granted.

Respectfully submitted,

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[***Editor's Note:*** *Page numbers from the online citation, 2010 WL 3987316 [*] and the unreported opinion [**], are indicated. Only the Westlaw citation is available as of this printing*]

[Doc. 52-1, filed October 12, 2010]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMAN LIFE OF WASHINGTON, INC., Plaintiff-Appellant,	)	
v.	)	Civil Action No. 09-35128
BRUMSICKLE, et al., Defendants-Appellees.	)	

OPINION

[**2] Opinion by Judge WARDLAW, Circuit Judge:

> [*1] "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate."

–*First National Bank v. Bellotti*, 435 U.S. 765, 791-92, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (foot-

notes omitted)

Human Life of Washington ("Human Life"), a nonprofit, pro-life advocacy corporation, appeals the district court's denial of summary judgment in its suit against various Washington state officials.[1] Human Life challenges, on First Amendment grounds, Washington state's Public Disclosure Law ("Disclosure Law"), enacted as part of its campaign finance regulation. The Supreme Court recently concluded that the government "may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Citizens United v. FEC,* ---U.S. ----, ----, 130 S.Ct. 876, 886, --- L.Ed.2d ----, ---- (2010). Based on [**3] this principle, and for many of the same reasons articulated by the well-reasoned opinion of the district court, we too conclude that Washington State's disclosure requirements do not violate the First Amendment, either facially or as applied to Human Life and its proposed campaign to educate voters about the dangers of physician-assisted suicide in connection with a ballot measure that would legalize the practice.

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[1] The named officials are Bill Brumsickle, Ken Schellberg, Dave Seabrook, Jane Noland, and Jim Clements, in their official capacities as officers and members of the Washington State Public Disclosure Commission, and Rob McKenna, in his official capacity as Washington Attorney General (collectively, with the state of Washington, "Washington State").

I. BACKGROUND

A. Human Life of Washington and Initiative 1000

In 2008, Washington voters were asked to consider a ballot initiative, Initiative 1000, which would "permit terminally ill, competent, adult Washington residents medically predicted to die within six months to request and self-administer lethal medication prescribed by a physician." Wash. Initiative Measure No. 1000 (2008). The measure quickly spawned an "emotionally charged battle" between its advocates and its opponents. Associated Press, *Washington State Battles over Vote to Allow Lethal Meds for Dying Patients,* Oct. 11, 2008; *see also* John Iwasaki, *"Playing God" or Dignified Death? Faith Based Groups Taking Crucial Role in Initiative Battle,* Seattle Post-Intelligencer, Oct. 13, 2008 ("On their respective Web sites, the campaigns for and against Initiative 1000 include point-by-point attempts to debunk the other side in the debate over [**4] physician-assisted suicide, the contentious end-of-life issue facing Washington voters in the general election.").

Human Life opposed Initiative 1000, consistent with its mission to "reestablish throughout our culture, the recognition that all beings of human origin are persons endowed with intrinsic dignity and the inalienable right to life from conception to natural death." In pursuit of this goal, Human Life engages in "educational, legislative, and judicial efforts" to "seek reform in our culture's understanding." Over the years, Human Life has expended considerable time and resources opposing efforts to legalize physician-assisted suicide in Washington. For example, in 1991, Human Life and its affiliated political action committee,

HLPAC, actively participated in the successful campaign to defeat Initiative 119, which would have amended Washington's constitution to legalize physician-assisted suicide. In 2008, on the day that Initiative 1000 was filed, Human Life issued a "special report" in an attempt to prevent the initiative from receiving a sufficient number of signatures to qualify for the ballot. Urging readers to "ENCOURAGE OTHERS NOT TO SIGN THE INITIATIVE," the report stated: "One would hope that it would deeply trouble the conscience of anyone inclined to sign this initiative petition, knowing they are signing some else's death warrant."

[*2][**5] With physician-assisted suicide back on the ballot in 2008, Human Life undertook plans to solicit funds for and launch a public education campaign. As Human Life explained in its verified complaint, filed April 16, 2008,

> The year 2008 is an especially vital time for HLW to address the physician-assisted suicide issue because people again will be unusually attentive as it swirls to the forefront of public attention.... The physician-assisted suicide issue is in people's focus because former Governor Booth Gardner filed the proposed I-1000 with the Secretary of State on January 9, 2008, with qualifying signatures due by July 3, 2008.

Human Life's planned educational campaign consisted of three proposed public communications, as well as "substantially similar activities" that had not yet been identified.

First, Human Life would distribute a solicitation letter via email, regular mail, and its website. The

proposed letter, which did not expressly mention Initiative 1000, opened: "The assisted suicide issue just won't go away. But neither will we. We are here to argue the prolife side on your behalf. However, as this grisly issue heats up again in 2008, Human Life of Washington needs your help to pay for some radio ads to educate the public." It went on to recount the defeat of the 1991 ballot initiative, to draw parallels between mid-19th century slavery abolitionists and modern-day pro-life advocates, and to discuss a study by a [**6] palliative-care specialist in Scotland, which it asserted "shows that problems with Oregon's assisted suicide scheme are real." In closing, the letter requested a donation to fund Human Life's public education campaign, stating that "[t]he public needs to receive this sort of information as assisted suicide advocates once again offer biased, inaccurate, and rosy depictions of this grisly practice."

Second, in addition to sending letters, Human Life intended to target individual voters by telephone. After introducing themselves as callers on behalf of Human Life, callers would read from a proposed script, alluding to Initiative 1000. The scripts read:

> Right now we are trying to reach every pro-life household in Washington with an urgent update. As you've probably heard, former Governor Booth Gardner is trying to get an initiative on the ballot this fall that would legalize physician-assisted suicide in the State of Washington. We fear that many Washingtonians do not know the grisly facts about physician-assisted-suicide and its devastating effect on a culture of life.

Callers then would solicit financial contributions to

Human Life's public education and advocacy activities.

Finally, Human Life intended to broadcast radio advertisements. It developed four proposed scripts for thirty-second radio spots. In one, a male voice would say, "Some people think that persons with disabilities don't have lives worth [**7] living," to which a female voice would respond, "Like Nazi docs!" In another proposed radio spot, the speaker would note that "[a]ssisted suicide is back in the news" and would go on to summarize results from a study about assisted suicide in Oregon. A third proposed advertisement would feature a male voice warning that physician-assisted suicide is a "slippery slope" because "people who *can't* consent-like babies-are being killed." Finally, in a fourth proposed radio spot, a speaker would warn that assisted suicide "turns doctors into killers." None of the proposed advertisements would expressly mention Initiative 1000, and each would end with a disclosure that the advertisement was sponsored by Human Life.

[*3] Human Life's educational campaign never got off the ground, however, because Human Life feared that its proposed communications would subject it to the requirements of Washington's Disclosure Law, a law that Human Life contends violates its First Amendment rights.

B. Washington's Public Disclosure Law

The Disclosure Law was enacted by ballot initiative in 1972, with the support of 72% of the voting public. It declares as Washington state's public policy "[t]hat political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided." Wash. Rev.Code § 42.17.010(1). It also states as Washington's public

policy that "full access to [**8] information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." *Id.* § 42.17.010(11). Under the Disclosure Law, this policy is implemented through detailed reporting, registration, and disclosure requirements (collectively, "disclosure requirements"), which are administered and enforced by Washington's Public Disclosure Commission (the "Commission"), a bipartisan citizen's commission whose live members are appointed by the governor and confirmed by the state senate.

According to the Commission's Executive Director, the Disclosure Law "enables the public to 'follow the money' with respect to campaigns and lobbying" by providing for the collection of informational forms, which become public record. These forms are now electronically available in searchable format through the Commission's website. The Commission's Chief Technology Officer reports that its website receives approximately 14,000 visitors per month. In addition, the media uses financial data in its reporting. *See, e.g.*, Richard Roesler, *I-1000 Advocates Raking It In*, Spokesman-Review, Apr. 30, 2008; Susan Gilmore, *How Money Talks on Initiatives*, Seattle Times, Nov. 22, 2004. As well as gathering data and reports, the Commission provides the public with aggregate data, analysis, and summaries in its biennial "Election Financing Fact Book."

[**9] At issue in this appeal are two aspects of the Disclosure Law: (1) the requirements imposed on "political committees" and (2) the requirements for "independent expenditures" and "political advertising." These provisions do not place a limit on expenditures

for advocacy; rather, they require only that covered entities make certain public disclosures.

1. Political Committees

The Disclosure Law defines a "political committee" as "any person (except a candidate or individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." Wash. Rev.Code § 42.17.020(39). As construed by Washington courts, this definition "sets forth two alternative prongs under which an individual or organization may become a political committee and subject to the Act's reporting requirements." *Evergreen Freedom Found. v. Wash. Educ. Ass'n,* 111 Wash.App. 586, 49 P.3d 894, 902 (Wash.Ct.App.2002). Under the prong at issue here-the "expenditures" prong-"a person or organization may become a political committee by ... expecting to make or making expenditures to further electoral political goals." *Id.* at 902-03. This definition has been narrowed by judicial construction to cover only an organization that has as its "primary or one of the primary purposes" to "affect, directly or [**10] indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *Id.* at 903 (quoting *State v. Dan J. Evans Campaign Comm.*, 86 Wash.2d 503, 546 P.2d 75, 79 (Wash.1976)).

[*4] A group's designation as a "political committee" triggers various disclosure requirements. First, all political committees must appoint a treasurer and open a bank account in the state of Washington. *See* Wash. Rev.Code § 42.17.050(1). In addition, they must register with the Commission by filing a two-page Political Committee Registration Form, which contains informa-

tion required by the Disclosure Law. This information includes the committee's name and address; the names and addresses of related and affiliated committees and persons; the names, addresses, and titles of the committee's officers and any persons authorized to make expenditures for the committee; a statement of whether the organization is a continuing one (i.e., whether it was established in anticipation of any election campaign in particular); the ballot proposition or candidate that the committee supports or opposes; how surplus funds will be distributed in the event of dissolution; and the name, address, and title of anyone who works for the committee to perform ministerial functions. *See id.* § 42.17.040.

Filing the registration form is the sole requirement imposed on political committees that raise or spend less than $5,000 in a year and that raise no more [**11] than $500 from any single donor. Wash. Admin.Code § 390-16-105(2); *see also* Wash. Rev.Code § 42.17.370(8) (authorizing the Commission to relieve political committees of certain reporting obligations). Political committees that exceed these limits must submit various additional reports to the Commission. *See* Wash. Rev.Code §§ 42.17.080, 42.17.090. First, monthly reports are required if the political committee "has received a contribution or made an expenditure in the preceding calendar month and either the total contributions received or total expenditures made since the last such report exceeds two thousand dollars." *Id.* § 42.17.080(2)(c). Second, a political committee must file periodic reports on certain dates relative to the election at issue: (1) the twenty-first day before an election, (2) the seventh day before an election, and (3) the tenth day of the first month after an election. *Id.* § 42.17.080(2)(a)-(b). Each periodic report must include

an accounting of the political committee's "funds on hand" at the beginning of the reporting period, including "[t]he surplus or deficit of contributions over expenditures"; the source and amount of contributions received; the source and amount of any loans to be used for the political committee's benefit; and the identity of "each candidate or political committee to which any transfer of funds was made, together with the amounts and dates of such transfers." *Id.* § 42.17.090(1).

2. Independent Expenditures and Political Advertising

[**12] An entity not subject to the disclosure requirements governing political committees may be required nonetheless to disclose certain information about its "independent expenditures" and "political advertising." For example, a corporation that does not qualify as a political committee because of its relatively limited involvement in political advocacy might, prior to a particular election, decide to spend money on a series of radio advertisements criticizing a candidate whose views the corporation considers inimical to its business interests. *See Citizens United,* 130 S.Ct. at 913 (holding that corporations have a First Amendment right to make independent expenditures). Under the Disclosure Law, the corporation might be subject to disclosure requirements associated with this activity even though the corporation does not qualify as a political committee.

[*5] An "independent expenditure" is "any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported." Wash. Rev.Code § 42.17.100(1). Disclosure requirements are triggered

if, in a given election, such an expenditure equals more than $100 or if its value cannot reasonably be estimated. *Id.* § 42.17.100(2). If an expenditure crosses this valuation threshold, an entity must submit "an initial report of all independent expenditures made during the campaign" up until that [**13] point in time. *Id.* The required two-page report must include the name and address of the person filing the report; the name and address of each person to whom an independent expenditure was made in the aggregate amount of more than fifty dollars; the amount, date, and purpose of each such expenditure; and the total sum of all independent expenditures made during the campaign. *Id.* § 42.17.100(5). After submitting the initial report, the regulated entity must submit monthly update reports, but this requirement applies only if "the reporting person has made an independent expenditure since the date of the last previous report filed." *Id.* § 42. 17.100(3)(c). Finally, three updates to the initial report are required on certain dates pegged to the election at issue: (1) the twenty-first day before the election, (2) the seventh day before the election, and (3) the tenth day of the month after the election. *Id.* § 42.17.100(3). The entity's reporting obligations cease after the post-election report is filed. *Id.*

In addition to disclosures for independent expenditures, the Disclosure Law sets forth requirements for "political advertising," defined as "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign." *Id.* § 42.17.020(38). An

[**14] advertisement must identify its sponsor: written political advertising must include the sponsor's name and address; radio and television ads must state the sponsor's name; and advertising undertaken as an independent expenditure must state that the advertisement was not approved by any candidate. *See id.* § 42.17.510(1)-(4). The Disclosure Law requires special reports for political advertising made twenty-one days before an election and that has a fair market value of $1,000 or more. *Id.* § 42.17.103(1). Such special reports must include the name and address of the person making the expenditure; the name and address of the person to whom the expenditure was made; a detailed description of the expenditure; the date that the expenditure was made and that the advertising was presented to the public; the amount of the expenditure; and the name of the candidate or ballot proposition supported or opposed by the expenditure. *Id.* § 42.17.103(3).

[*6] These disclosure requirements do not apply to a "news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or a political committee." *Id.* § 42.17.020(15)(b)(iv) (listing news media exceptions to the definition of "contribution"); Wash. Admin. Code § 390-16-206 (exempting news media from independent expenditure disclosure requirements). Nor do they [**15] apply to "letters to the editor, news or feature articles, editorial comment or replies thereto in a regularly published newspaper, periodical, or on a radio or television broadcast where payment for the printed space or broadcast time is not normally required." Wash.

Admin. Code § 390-05-290 (listing exceptions to the definition of "political advertising"); *id.* § 390-16-206 (exempting the foregoing from political advertising disclosure requirements).

C. Procedural History

On April 16, 2008, Human Life filed this lawsuit, seeking a declaration that Washington's Disclosure Law is unconstitutional and an injunction against its enforcement. On August 7, 2008, Human Life moved for summary judgment. It submitted no evidence in support of its motion, instead stating that all relevant facts were set forth in its verified complaint. In opposition, the Commission submitted declarations and other documents containing information about the Commission's operations and the public's use of the disclosure data it had compiled. In reply, Human Life submitted excerpts of its CEO Dan Kennedy's deposition.

While Human Life's summary judgment motion remained pending, Washington voters approved Initiative 1000 on Election Day, November 4, 2008, effectively legalizing physician-assisted suicide. Thereafter, on January 8, 2009, [**16] the district court denied Human Life's summary judgment motion. After ruling that Initiative 1000's passage did not moot Human Life's lawsuit, the district court rejected Human Life's contention that the Disclosure Law's requirements for "political committees," "independent expenditures," and "political advertising" are unconstitutional. Final judgment was entered on January 23, 2009. We have jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291, and "[w]e review the constitutionality of a statute de novo." *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir.2010).

II. DISCUSSION

A. Justiciability

"[T]he Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1138 (9th Cir.2000) (en banc) (quoting *Ry. Mail Ass'n v. Corsi,* 326 U.S. 88, 93, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945)). Thus, before reaching the merits of Human Life's constitutional claims, we must determine whether this appeal is justiciable. *See Long Beach Area Chamber of Commerce v. City of Long Beach,* 603 F.3d 684, 689 (9th Cir.2010). We agree with the district court's reasoning and conclude that the appeal presents a case or controversy even though Human Life refrained from [**17] engaging in its planned public education campaign, and we find that the controversy remains live even after the passage of Initiative 1000 almost two years ago.

1. Standing and Ripeness

[*7] To satisfy Article III's case or controversy requirement, Human Life must establish standing to sue. "[T]he irreducible constitutional minimum of standing contains three elements": the plaintiff must demonstrate (1) an injury-in-fact, (2) causation, and (3) a likelihood that the injury will be redressed by a decision in the plaintiff's favor. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Because the court's role is "neither to issue advisory opinions nor to declare rights in hypothetical cases," the case or controversy standard also requires that a claim be ripe for review. *Thomas,* 220 F.3d at 1138 ("The constitutional component of the

ripeness inquiry is often treated under the rubric of standing...."). In the context of pre-enforcement constitutional challenges, where the plaintiff has not yet been penalized for violating the challenged statute, we have held that "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Id.* at 1139. Rather, in general, a case or controversy exists only if the plaintiff faces a "genuine threat of imminent prosecution." *Id.*

[**18] However, when a challenged statute risks chilling the exercise of First Amendment rights, "the Supreme Court has dispensed with rigid standing requirements," *Cal. Pro-Life Council Inc. v. Getman (CPLC-I),* 328 F.3d 1088, 1094 (9th Cir.2003), and recognized "self-censorship" as "a harm that can be realized even without an actual prosecution," *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988); *see also Dombrowski v. Pfister,* 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights."). As we have held, where a plaintiff has refrained from engaging in expressive activity for fear of prosecution under the challenged statute, such self-censorship is a "constitutionally sufficient injury" as long as it is based on "an actual and well-founded fear" that the challenged statute will be enforced. *CPLC-I,* 328 F.3d at 1093, 1095; *see also Ariz. Right to Life PAC v. Bayless,* 320 F.3d 1002, 1006 (9th Cir.2003) (finding that an entity that was "forced to modify its speech and behavior to comply with the statute" had suffered injury even though it had

"neither violated the statute nor been subject to penalties for doing so"). Such fear exists if the "intended speech arguably falls within the statute's reach." *CPLC-I*, 328 F.3d at 1095.

[**19] The present appeal is indistinguishable from *CPLC-I*, where we found that the California Pro-Life Council ("CPLC") had established standing even though it had not been subject to prosecution under the statute it challenged. The statute required disclosures for any communication that "unambiguously urges a particular result in an election." *Id.* at 1096 (emphasis omitted). Because CPLC "feared enforcement proceedings might be initiated," *id.* at 1094, CPLC refrained from spending money to distribute voter guides that advocated pro-life positions implicated by pending ballot initiatives, *id.* at 1092-93. Even though CPLC's voter guides did not use "explicit words of advocacy," we concluded that they arguably fell within the statute's provisions. *Id.* at 1095. Thus, although we cautioned that "[t]he self-censorship door to standing does not open for every plaintiff," we concluded that CPLC's self-censorship was based on a reasonable fear of prosecution and was therefore a "constitutionally recognized injury." *Id.*

[*8] Because Human Life's decision to refrain from implementing its educational program was based on a reasonable fear of enforcement of the Disclosure Law, we conclude that Human Life has established a case or controversy. Human Life produced evidence of planned communications that arguably fall within the ambit of the statute it is challenging. The Disclosure Law imposes obligations on an entity when one of its "primary purposes" is "to affect, directly or indirectly, [**20] governmental decision making by supporting or

opposing candidates or ballot propositions." *Evergreen*, 49 P.3d at 903 (quoting *Evans*, 546 P.2d at 79) (interpreting the definition of "political committee"). Disclosure obligations also apply to political advertising "used for the purpose of appealing, directly or indirectly, for votes," Wash. Rev.Code § 42.17.020(38), and to expenditures "made in support of or in opposition to any candidate or ballot proposition" that meet certain monetary thresholds, *id.* § 42.17.100. Given the Disclosure Law's apparent coverage, Human Life's fear of being subject to its enforcement is well founded, and Human Life "does not have to await the consummation of threatened injury to obtain preventive relief." *Ariz. Right to Life PAC*, 320 F.3d at 1006 (quoting *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 143, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974)).

2. Mootness

The passage of Initiative 1000 in 2008 does not alter the justiciability of Human Life's constitutional challenge because that challenge falls squarely within the class of cases "capable of repetition, yet evading review." *See, e.g., Davis v. FEC*, --- U.S. ----, ----, 128 S.Ct. 2759, 2770, 171 L.Ed.2d 737 (2008); *FEC v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449, 462, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007); *Bellotti*, 435 U.S. at 774. This "established exception" to the mootness doctrine applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a [**21] reasonable expectation that the same complaining party will be subject to the same action again." *Davis*, 128 S.Ct. at 2769 (quoting *WRTL*, 551 U.S. at 462). As we have recognized, the exception frequently arises in election cases "because the inherently brief duration of an

election is almost invariably too short to enable full litigation on the merits." *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir.2003); *see also, e.g., WRTL*, 551 U.S. at 462 (reviewing a challenge to federal limits on corporate electioneering expenditures after the relevant primary election); *Norman v. Reed*, 502 U.S. 279, 287-88, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992) (reviewing a challenge to state requirements governing the use of a name by a new political party after the relevant county election); *Bellotti*, 435 U.S. at 774 (reviewing a challenge to a state ban on corporate expenditures to influence votes on referendum proposals after the relevant referendum vote); *Alaska Right to Life Comm. v. Miles (ARTLC)*, 441 F.3d 773, 779 (9th Cir.2006) (reviewing a challenge to state disclosure provisions after the relevant ballot initiative vote); *CPLC-I*, 328 F.3d at 1095 n. 4 (same); *Reich v. Local 396, Int'l Bhd. of Teamsters*, 97 F.3d 1269, 1272 n. 5 (9th Cir.1996) (reviewing a challenge to withholding information from a candidate after the candidate's opportunity to be elected had passed).

[*9] The present appeal is a case in point. Although Human Life filed suit almost seven months before the November 2008 vote on Initiative 1000, complete [**22] litigation of Human Life's claim requires a considerably longer period of time. Indeed, this litigation continues nearly two years after the Initiative 1000 vote has come and gone. As with most election cases, we have little difficulty concluding that the duration element of the "capable of repetition, yet evading review" exception applies to the circumstances here.

As for the reasonable expectation requirement, we conclude there is a reasonable expectation that Human

Life again will be subject to self-censorship if the Disclosure Law's constitutionality remains in doubt. Human Life is a politically active organization that has been heavily involved in public debates about pro-life issues in the past and intends to undertake future communications like those it wished to make in conjunction with the Initiative 1000 vote. This is sufficient to establish a reasonable expectation that Human Life will face the prospect of enforcement of the Disclosure Law again. *See, e.g., WRTL,* 551 U.S. at 463 (rejecting a mootness argument in a suit by an ideological advocacy corporation, stating that it "credibly claimed that it planned on running 'materially similar' future targeted broadcast ads mentioning a candidate within the blackout period and there is no reason to believe that the FEC will 'refrain from prosecuting violations' of BCRA" (citations omitted)); *ARTLC,* 441 F.3d at 779 (rejecting a mootness argument where nonprofit AKRTL planned to engage in a routine, [**23] ideological telemarketing campaign when "the provisions of Alaska law challenged by AKRTL remain in place"); *CPLC-I,* 328 F.3d at 1095 n. 4 (rejecting a mootness argument where an issue advocacy corporation planned to distribute voter guides as it had in the past in the face of state disclosure requirements).

B. Facial Challenges to the Disclosure Law

At the heart of Human Life's appeal is its contention that certain aspects of the Disclosure Law are facially unconstitutional. In particular, Human Life argues that the Disclosure Law's definitions of "political committee," "independent expenditure," and "political advertising" impose burdens that cannot be justified by Washington State's interest in disclosure and are therefore unconstitutional We begin by identi-

fying the applicable level of judicial scrutiny. We then discuss the governmental interest supporting the Disclosure Law's requirements. Finally, we turn to Human Life's arguments that certain Disclosure Law provisions are not sufficiently tailored to that interest.

1. Standard of Review

The parties dispute the level of judicial scrutiny applicable to Washington State's disclosure requirements, and indeed, there has been room for debate on this issue given this circuit's wrestling with the standard of review appropriate in disclosure cases. The Supreme Court's seminal campaign finance decision, [**24] *Buckley v. Valeo,* mapped the basic distinction between financial limitations, which "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," and disclosure requirements, which "impose no ceiling on campaign-related activities." *Buckley v. Valeo,* 424 U.S. 1, 19, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam). It noted that, in contrast to expenditure and contribution limitations, "disclosure requirements–certainly in most applications-appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68. However, the Court also recognized that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Id.* at 64. Rather, the *Buckley* Court applied "exacting scrutiny" to the disclosure requirements and "insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to

be disclosed." *Id.* at 68 (footnotes omitted).

[*10] Despite the *Buckley* Court's clear endorsement of "exacting scrutiny," confusion emerged in our circuit as to the level of judicial scrutiny applicable to constitutional challenges to campaign finance disclosure requirements. Much of the confusion can be traced to our initial interpretation of the Supreme Court's [**25] decision in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). In *MCFL*, the Court considered the constitutionally of a federal prohibition on corporate independent expenditures as applied to MCFL, a nonprofit, non-stock, ideological corporation not unlike Human Life. *Id.* at 241-42. Although MCFL did not qualify as a "political committee" under the federal statute, then-existing law prohibited any corporation from making independent expenditures unless the corporation established a separate, segregated fund containing monies specifically earmarked for campaign spending. *Id.* at 253. This separate fund would be subject to "political committee" requirements, including "[d]etailed record keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records," thus essentially requiring MCFL "to assume a more sophisticated organizational form." *Id.* at 254; *see also ARTLC*, 441 F.3d at 791 (distinguishing the provisions at issue in *MCFL* because they "require structural changes"). The Court found that the "practical effect" of imposing such requirements on organizations like MCFL was to make "engaging in protected speech a severely demanding task," *MCFL*, 479 U.S. at 256, thereby "directly limiting the ability of such organizations to engage in core political speech," *id.* at 254. Considering the as-applied chal-

lenge, the *MCFL* Court [**26] subjected the federal provision to strict scrutiny review and concluded that it was unconstitutional as applied to MCFL. *Id.* at 256.

That *MCFL* involved a financial limitation rather than a disclosure requirement is an arguable basis for distinguishing the rationale for applying the strict scrutiny standard in *MCFL* from the application of the exacting scrutiny standard in the disclosure context in *Buckley*. However, because the *MCFL* Court discussed its application of strict scrutiny in terms of the onerous disclosure requirements imposed upon segregated funds (rather than in terms of the financial limitations imposed on corporations), we read the two cases as being in tension with one another.

Our analysis in *CPLC-I* reflects this interpretation of *Buckley* and *MCFL* as inconsistent. In *CPLC-I,* an ideological advocacy corporation challenged California's requirement that "political committees" disclose information about financial activities undertaken to "expressly advocate the passage or defeat of a ballot measure." *CPLC-I,* 328 F.3d at 1092. In light of the differing standards of review applied in *Buckley* and *MCFL,* we stated that "the Supreme Court has been less than clear as to the proper level of judicial scrutiny we must apply in deciding the constitutionality of disclosure regulations." *Id.* at 1101 n. 16. We reasoned, "Given that the *MCFL* Court considered FECA's disclosure requirements to be a [**27] severe burden on political speech for multi-purpose organizations, we must analyze the California statute under strict scrutiny." *Id.* "Notwithstanding *Buckley*" we therefore held that the strict scrutiny standard applies to disclosure requirements, and we remanded to the district court to apply that test. *Id.*

[*11] Following our decision in *CPLC-I*, the waters of the applicable standard of review were further muddied by the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). Considering a federal campaign finance disclosure law, *McConnell* upheld the requirement that any person making disbursements of $10,000 or more in a calendar year for electioneering communications must file a statement with the FEC identifying the pertinent election and all persons sharing the costs of the disbursements. *Id.* at 194. The *McConnell* Court did not explicitly describe the level of scrutiny applied to the disclosure requirements, stating only that the requirements were supported by "important state interests." *Id.* at 196. In its analysis, the *McConnell* Court appeared to endorse *Buckley's* use of exacting scrutiny, stating that *Buckley* "amply supports application of [the] disclosure requirements" at issue. *Id.* However, it did not distinguish *MCFL* or its application of the strict scrutiny standard. *Id.*

After *McConnell* augmented the confusion regarding the applicable standard of review in disclosure cases, our circuit began to avoid the issue rather than [**28] stating the appropriate level of scrutiny in any given context. For example, in *ARTLC*, rather than attempting to untangle the conflicting doctrine, we first acknowledged that the applicable standard of review was "somewhat unclear," *ARTLC*, 441 F.3d at 787, and then we resolved to "assume without deciding that strict scrutiny applies to all of the challenged disclosure requirements," *id.* at 788. The following year in *California Pro-Life Council, Inc. v. Randolph (CPLC-II)*, 507 F.3d 1172 (9th Cir.2007), we again avoided deciding the standard of review issue, concluding that

the law of the case, as established in *CPLC-I*, required application of the strict scrutiny standard. *Id.* at 1177 n. 5 ("We need not resolve any potential conflict because we are bound by the 'law of the case' to apply strict scrutiny."). Finally, in *Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009), after lamenting that the degree of scrutiny applicable to disclosure requirements "is somewhat unclear, due in part to arguably inconsistent precedent," we stated, "We do not need to decide this complex question to adjudicate this case." *Id.* at 1031.

Recent Supreme Court decisions have eliminated the apparent confusion as to the standard of review applicable in disclosure cases. The Court has clarified that a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important [**29] governmental interest. In *Doe v. Reed*, --- U.S. ----, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010), the Supreme Court examined a statute authorizing public disclosure of the signatories to a ballot initiative. In explaining why disclosure requirements were subject to the less demanding standard of review of exacting scrutiny, the *Reed* Court emphasized that the statute at issue was "not a prohibition on speech, but instead a *disclosure* requirement." *Id.* at 2818. As the Court held in *Citizens United*, "disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.' " *Citizens United*, 130 S.Ct. at 914 (quoting *Buckley*, 424 U.S. at 64; *McConnell*, 540 U.S. at 201). The *Reed* Court continued:

> [*12] We have a series of precedents considering First Amendment challenges to disclosure

> requirements in the electoral context. These precedents have reviewed such challenges under what has been termed "exacting scrutiny." That standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.

Reed, 130 S.Ct. at 2818 (citations and internal quotation marks omitted). As the latest in a trilogy of recent Supreme Court cases, *Reed* confirmed that exacting scrutiny applies in the campaign finance disclosure context. *See Citizens United,* 130 S.Ct. at 914; *Davis,* 128 S.Ct. at 2765-66. We therefore apply exacting scrutiny to Human Life's facial challenges to the Disclosure Law and examine [**30] whether the law's requirements are substantially related to a sufficiently important governmental interest.

2. Governmental Interest

Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment. As the Supreme Court explained in *Buckley,* "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley,* 424 U.S. at 14-15; *see also McConnell,* 540 U.S. at 197 (recognizing the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace" (quoting *McConnell v. FEC,* 251 F.Supp.2d 176, 237 (D.D.C.2003))). Thus, by revealing information about the contributors to and participants in public discourse and debate, disclosure laws help ensure that voters have the facts they need to evaluate the various

messages competing for their attention.

This vital provision of information repeatedly has been recognized as a sufficiently important, if not compelling, governmental interest. As the Court first articulated in *Buckley,*

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in [**31] evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley, 424 U.S. at 66-67. *Buckley* recognized this informational interest as substantial, and in its campaign finance jurisprudence, the Supreme Court consistently has acknowledged the important role played by disclosure requirements in political discourse. *See Citizens United,* 130 S.Ct. at 915-16 (recognizing the government's informational interest as substantial and stating that the "First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way"); *McConnell,* 540 U.S. at 197 (upholding BCRA's disclosure requirements, while striking down its segregated fund requirement); *MCFL,* 479 U.S. at 262 (relying on the existence of disclosure requirements in rejecting the government's argument that failure to apply the more

onerous segregated fund requirement to MCFL would result in dangerous amounts of spending by nonprofits on behalf of corporations and unions). Similarly, we have frequently reiterated what we recognized in *CPLC-I:* that in the "cacophony of political communications through [**32] which California voters must pick out meaningful and accurate messages ... being able to evaluate who is doing the talking is of great importance." *CPLC-I,* 328 F.3d at 1105; *see also Canyon Ferry,* 556 F.3d at 1032 ("[W]e have little trouble concluding that Montana's informational interest is generally 'important' in the context of Montana's statewide ballot issues."); *CPLC-II,* 507 F.3d at 1179 n. 8 ("[I]n the context of disclosure requirements, the government's interest in providing the electorate with information related to election and ballot issues is well-established."); *ARTLC,* 441 F.3d at 793 (recognizing that "[i]ndividual citizens seeking to make informed choices in the political marketplace ... need to know what entity is funding a communication" (citation and internal quotation marks omitted)).

[*13] We have observed that these considerations "apply just as forcefully, if not more so, for voter-decided ballot measures." *CPLC-I,* 328 F.3d at 1105. In the ballot initiative context, where voters are responsible for taking positions on some of the day's most contentious and technical issues, "[v]oters act as legislators," while "interest groups and individuals advocating a measure's defeat or passage act as lobbyists." *Id.* at 1106. As a result of this process, "average citizens are subjected to advertising blitzes of distortion and half-truths and are left to figure out for themselves which interest groups pose the greatest threats to their [**33] self-interest." *Id.* at 1105-06

(quoting David S. Broder, Democracy Derailed: Initiative Campaigns and the Power of Money 18 (2000)). Thus, the high stakes of the ballot context only amplify the crucial need to inform the electorate that is well recognized in the context of candidate elections.

Notably, in the lobbying context, the Supreme Court has upheld disclosure requirements enabling lawmakers "to know who is being hired, who is putting up the money, and how much." *United States v. Harriss*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1956). The Court found these requirements necessary because "legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures." *Id.*

In a similar manner, citizens, acting "as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyists' services and how much." *CPLC-I*, 328 F.3d at 1106; *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) (recognizing in the ballot initiative context the interest of voters in knowing "the identity of those whose money supports or opposes a given ballot measure"). Indeed, the provision of this information is [**34] particularly critical in the ballot measure context, "especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown." *CPLC-I*, 328 F.3d at 1106. If nothing else,

"knowing who backs or opposes a given initiative" will give voters "a pretty good idea of who stands to benefit from the legislation." *Id.*

Access to reliable information becomes even more important as more speakers, more speech-and thus more spending—enter the marketplace, which is precisely what has occurred in recent years. Like campaigns for elected office, ballot initiatives are the subject of intense debate and, accordingly, greater expenditures to ensure that messages reach voters. As we noted in *CPLC-I,* "initiative campaigns have become a money game." *Id.* at 1105 (quoting Broder at 18). By one account, spending on political campaigns reached $5.3 billion in 2008, a 27% increase over 2004 spending. *See* Jeanne Cummings, *2008 Campaign Costliest in U.S. History,* Politico, Nov. 5, 2008. The Commission's own data reveal that independent expenditures in Washington elections and ballot initiative contests increased from $269,275 in 1994 to nearly $8 million in 2004. According to the Commission, committees reported receiving more than $12.5 million in contributions and making more than $12 million in expenditures for ballot initiatives in 2006, and expenditures for and against a single ballot measure have [**35] reached more than $15.5 million. As one journalist has observed, "Money does not always prevail in initiative fights, but it is almost always a major-even dominant-factor." Broder at 7; *see also* Daniel Smith, Campaign Financing of Ballot Initiatives in the American States 71 (2001) ("[C]ampaign financing ... play[s] a central role in ballot measures.").

[*14] The district court noted the particular importance of the government's informational interest in this

case given the nature of ballot initiative campaigns across the country: "The state's interest in informing the electorate about 'where political campaign money comes from and how it is spent' is only amplified in the ballot initiative context as more and more money is poured into ballot measures nationwide." *Human Life of Wash., Inc. v. Brumsickle,* No. C08-0590-JCC, 2009 WL 62144, at *13 (W.D.Wash. Jan.8, 2009) (citation omitted). The district court concluded that the "state therefore retains an extremely compelling interest in 'following the money' in the ballot initiative context so that the electorate's decision may be an informed one." *Id.* As trends in campaign finance jurisprudence have opened the door to even more political expenditures in [**36] the future, the magnitude of the state's interest is only likely to increase.[2] *See, e.g., Citizens United,* 130 S.Ct. at 911 (holding unconstitutional a prohibition on corporate independent expenditures and stating that "it is our law and our tradition that more speech, not less, is the governing rule" under the First Amendment); *Long Beach Area Chamber of Commerce,* 603 F.3d at 695-99 (following *Citizens United* to deem limitations on contributions to and expenditures by independent expenditure committees violative of the First Amendment).

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[2] Alarmingly, as levels in political spending rise dramatically, the percentage of independent entities disclosing information about where that political spending comes from has sharply declined. *See* Editorial, *The Secret Election,* N.Y. Times, Sept. 18, 2010 (reporting that the rate of disclosure by independent groups receiving electioneering donations dropped from almost 100% in 2004 and 2006, to less than 50% in 2008, to only 32% in 2010).

Campaign finance disclosure requirements thus advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another. The increased "transparency" engendered by disclosure laws "enables the electorate to make informed decisions and give proper weight to different speakers and messages." [**37] *Citizens United,* 130 S.Ct. at 916. As the Supreme Court has stated: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." *Bellotti,* 435 U.S. at 791-92. Disclosure requirements, like those in Washington's Disclosure Law, allow the people in our democracy to do just that.

3. Tailoring Analysis

To survive exacting scrutiny, the Disclosure Law's challenged provisions must bear a substantial relationship to Washington State's sufficiently important interest in providing the electorate with source and financial information to inform their decisionmaking at the ballot box. *See Reed,* 130 S.Ct. at 2818. Human Life contends that three aspects of the Disclosure Law are insufficiently related to Washington's interest in ensuring an informed electorate: (a) the definition of "political committee"; (b) the disclosure requirements imposed on political committees; and (c) the definitions of "independent expenditure" and "political adver-

tising."

a. Definition of "Political Committee"

[*15][**38] An organization qualifies as a "political committee" if its "primary or one of the primary purposes" is "to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *Evergreen Freedom Found.*, 49 P.3d at 903 (quoting *Evans*, 546 P.2d at 79). Human Life contends that this definition sweeps too broadly, and thus is not substantially related to the government's informational interest, because it covers groups with "a" primary purpose of political advocacy, instead of being limited to groups with "the" primary purpose of political advocacy. Human Life argues that the First Amendment categorically prohibits the government from designating a group as a "political committee" unless the group's sole, primary purpose is political advocacy, and it argues that this result is compelled by the Supreme Court's decision in *Buckley*. Thus, Human Life contends that the breadth of the Disclosure Law's definition of "political committee" renders it per se facially unconstitutional. We disagree with Human Life's premise regarding the scope of constitutionally permissible political committee regulation and with its conclusion that the Disclosure Law's definition of "political committee" is too broad to be substantially related to the government's important informational interest.

[**39] To support its proposed bright-line prohibition on regulating groups with only "a" primary purpose of political advocacy, Human Life relies on *Buckley*. There, the Supreme Court narrowly construed the definition of "political committee" under federal

campaign finance law.[3] The Court noted that FECA's definition of "political committee" referred only to a monetary threshold, and thus could be construed as reaching large amounts of pure issue advocacy-in which case the burdens imposed on speech would outstrip the governmental interests furthered by the Act. To avoid this unconstitutional result, the *Buckley* Court adopted the lower court's narrowing construction of the definition of "political committees":

> To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Buckley, 424 U.S. at 79. Thus, by limiting the definition of which entities were subject to FECA's requirements, the Court ensured that those requirements were substantially related to the purposes of the Act.

[**40] Seizing upon the phrase "the major purpose," Human Life insists that a statute is unconstitutional under *Buckley* if it imposes disclosure requirements on groups with multiple "major purposes," even if one of the group's major purposes happens to be political advocacy. Put differently, Human Life argues that *Buckley* establishes a bright-line rule that, unless the

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[3] Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3 (1972), *amended by* Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 81, 2 U.S.C. § 431 et seq.

sole major purpose of a group is political advocacy, any regulation of that group will automatically be too burdensome to be justified by the state's informational interest. The Fourth Circuit has adopted Humans Life's view, reading *Buckley* as a statement of "the Supreme Court's insistence that political committees can only be regulated if they have the support or opposition of candidates as their primary purpose." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 289 (4th Cir.2008).

[*16] We disagree with Human Life's reading of *Buckley*, and we reject its invitation to adopt a bright-line rule prohibiting all regulation of groups with "a" primary purpose of political advocacy. The *Buckley* Court's statement that a narrow definition of political committee "can be assumed to fall within the core area sought to be addressed by Congress" is most reasonably read to mean exactly what it says-that it was clear and uncontroversial that the burdens imposed by the disclosure requirements in that case were "by definition" substantially related to the government's interests when applied to organizations whose single major [**41] purpose was political advocacy. Nothing in *Buckley* suggests, however, that disclosure requirements are constitutional only when so applied. Contrary to Human Life's interpretation, *Buckley's* statement-that defining groups with "the major purpose" of political advocacy as political committees is sufficient "[t]o fulfill the purposes of the Act," *Buckley* 424 U.S. at 79-does not indicate that an entity must have that major purpose to be deemed constitutionally a political committee. *See, e.g., CPLC-II*, 507 F.3d at 1180 n. 11 ("[T]his Court has held that irrespective of the major purpose of an organization,

disclosure requirements may be imposed."); *Canyon Ferry,* 556 F.3d at 1026 (discussing Montana regulations of "incidental political committees," which are subject to disclosure requirements if they make contributions or expenditures, regardless of their primary purpose). Rather, in stating that disclosure requirements "(1) cannot cover 'groups engaged purely in issue discussion' and (2) can cover 'groups the major purpose of which is the nomination or election of a candidate,' " the *Buckley* Court "defined the outer limits of permissible political committee regulation." *Leake,* 525 F.3d at 327 (Michael, J., dissenting). What is permissible within these outer limits depends on whether the burdens imposed by the disclosure requirements are substantially related to the government's important informational interest.

[**42] Human Life argues that our reading of *Buckley* is inconsistent with the Supreme Court's decision in *MCFL,* which it claims "reaffirmed *Buckley's* major-purpose test." *MCFL* did no such thing. *MCFL* considered whether the burden of a corporate campaign expenditure limitation was unconstitutional as applied to an ideological nonprofit; it did not consider a facial challenge to a disclosure requirement imposed on entities engaging in political advocacy. *See MCFL,* 479 U.S. at 241. Not only did *MCFL* involve a higher standard of review than is appropriate here, but it also dealt with significantly more severe burdens on First Amendment rights. As the Supreme Court has made clear, financial limitations are subject to a different constitutional analysis than are disclosure requirements. *See, e.g., Reed,* 130 S.Ct. at 2813; *Citizens United,* 130 S.Ct. at 914. Limitations on expenditures entail the application of strict scrutiny

rather than exacting scrutiny, and they are uniformly recognized as implicating the most central First Amendment interests. As the Court in *MCFL* stated, independent expenditures lie at "the core of our electoral process and of First Amendment freedoms," *MCFL,* 479 U.S. at 251 (quoting *Buckely,* 424 U.S. at 39)), and their limitation must be justified by a compelling state interest. The Court also recognized the significant burden imposed by such limitations, which have the effect of "directly limiting" some entities' ability to "engage in core political [**43] speech," *id.* at 255, whereas disclosure requirements are "less restrictive," *id.* at 262. Furthermore, in *MCFL,* political advocacy was not "a" major purpose-much less "the" major purpose-of MCFL, which the Court noted only "occasionally engages in activities on behalf of political candidates," and whose "central organizational purpose is issue advocacy." *Id.* at 253 n. 6.

[*17] Thus, the proposed bright-line prohibition that Human Life argues is established by *Buckley* was not at issue in *MCFL* and is not supported by its reasoning. The Court stated that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity," it would be classified as a political committee under the existing statute. *MCFL,* 479 U.S. at 262. But this statement that MCFL's increased campaign spending could render it a political committee under the statute in no way forecloses the government's ability to affirmatively designate as "political committees" groups with "a" major purpose of political advocacy.

Having rejected the notion that the First Amendment categorically prohibits the government from

imposing disclosure requirements on groups with more than one "major purpose," we turn to the crux of the applicable constitutional analysis-whether there is a substantial relationship between Washington State's informational interest and its decision to impose disclosure requirements on [**44] organizations with a primary purpose of political advocacy. We conclude that there is.

The Disclosure Law does not extend to all groups with "a purpose" of political advocacy, but instead is tailored to reach only those groups with a "primary" purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy. Under this statutory scheme, the word "primary"—not the words "a" or "the"—is what is constitutionally significant. *See Leake,* 525 F.3d at 328 (Michael, J., dissenting) ("The key word providing guidance to both speakers and regulators in 'the major purpose' test or 'a major purpose' test is the word 'major,' not the article before it."). While we do not hold that the word "primary" or its equivalent is constitutionally necessary, we do hold that it is sufficient in this case to ensure that the Disclosure Law is appropriately tailored to the government's informational interest.

Furthermore, the Disclosure Law's definition of "political committee" is "tailored to address a fundamental organizational reality" that most organizations "do not have just one major purpose." *Id.* at 330. Human Life concedes, as it must, that there is a substantial relationship between the government's [**45] informational interest and the disclosure re-

quirements it may impose on groups whose single primary purpose is political advocacy. We fail to see how that relationship changes so materially as to render the relationship insubstantial once the groups engage in several primary purposes including political advocacy. Indeed, in some circumstances, the latter relationship may be stronger than the former. Consider, for instance, two otherwise identical groups: One spends 40% of its time and resources on political advocacy, 30% of its time and resources producing merchandise, and 30% of its time and resources overseeing academic research. The other group spends 45% of its time and resources on political advocacy, 45% of its time and resources producing merchandise, and 10% of its time and resources overseeing academic research. Political advocacy is "the" major purpose for the former group (because political advocacy commands the largest share of the group's time and resources), but it is just "a" major purpose of the latter (because the group expends equal time and resources on political advocacy and merchandise production). Under Human Life's interpretation of *Buckley*, the government may constitutionally regulate the former group and not the latter, even though in absolute terms the latter group spends more time and resources than the former on political advocacy. The manner in which the Disclosure Law's definition of "political committee" interacts with the nuances of [**46] entities' organizational structure reinforces the conclusion that the definition is substantially related to the government's informational interest.

[*18] In addition, the Disclosure Law addresses the "hard lesson of circumvention" that has historically plagued the campaign finance context. *McConnell*, 540 U.S. at 165; *see also Citizens United*, 130 S.Ct. at 912

("Political speech is so ingrained in our culture that speakers find ways to circumvent [these] campaign finance laws."); *McConnell*, 540 U.S. at 176 ("Experience under the current law demonstrates that Congress' concerns about circumvention are not merely hypothetical."). If the Disclosure Law exempted groups with only "a" primary purpose of political advocacy, a group like Human Life's affiliated political action committee, HLPAC (which unmistakably qualifies as a political committee under the Disclosure Law), could evade political committee status simply by merging with its affiliated organization, and thus diluting the newly created organization's relative share of advocacy activity. *See Leake*, 525 F.3d at 332 (Michael, J., dissenting) (warning that such a standard "effectively encourages advocacy groups to circumvent the law by *not* creating political action committees and instead to hide their electoral advocacy from view by pulling it into the fold of their larger organizational structure"). Washington's Disclosure Law minimizes this risk of circumvention by tailoring its definition of "political committee" to [**47] cover groups with a primary purpose of political advocacy, while still exempting those that are primarily devoted to issue advocacy.

Thus, the Disclosure Law's definition of "political committee" is substantially related to the government's sufficiently important informational interest. By applying the disclosure requirements attached to political committee status to organizations with a primary purpose of political advocacy, its coverage vindicates the government's interest in an informed electorate without imposing on nonpolitical organizations unnecessarily. We therefore conclude that the definition of "political committee" does not violate the First Amendment.

b. Political Committee Disclosure Requirements

Human Life argues that, even if the definition of "political committee" is constitutionally permissible and groups with a primary purpose of political advocacy may be regulated, the requirements the Disclosure Law imposes on groups satisfying that definition are unconstitutionally onerous. Human Life relies on our decision in *CPLC-II*, in which we held that California's "political action committee-like" disclosure requirements were unconstitutional as applied to a "nonprofit, nonsectarian, educational organization dedicated to educating the public on abortion, infanticide, and euthanasia." *CPLC-II*, 507 F.3d at 1174, 1187. Applying strict scrutiny, the *CPLC-II* panel cited *MCFL's* holding that a [**48] segregated fund financial requirement was not narrowly tailored to the government's interest in regulating an ideological nonprofit,[4] and it concluded that the disclosure requirements at issue were not narrowly tailored. The panel noted the Court's conclusion in *MCFL* that the state's informational interest could be achieved "in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee." *Id.* at 1189 (quoting *MCFL*, 479 U.S. at

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[4] We note that because Human Life already has a political action committee, HLPAC, the effect of the Disclosure Law on Human Life differs from the effect the federal law had on the nonprofit in *MCFL*. There, the corporation would have been required to engage in major bureaucratic restructuring due to incidental political advocacy. Here, the structural requirements imposed by the Disclosure Law already exist.

262). Arguing that *CPLC-II* controls the outcome of this case, Human Life characterizes the issue before us as "whether Washington may do what this Court said California may not do"—namely, require political committees to appoint a treasurer, open a bank account in the state, and file certain reports.

[*19] We reject Human Life's contention that *CPLC-II* governs the issue of whether Washington State's political committee disclosure requirements are unconstitutionally onerous because we apply a different standard of review than that applied in *CPLC-II*. Though we are bound to follow circuit precedent, an exception to this rule exists: "[I]n the face of intervening Supreme Court and en [**49] banc opinions, 'a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled.' " *United States v. Broussard*, 611 R3d 1069, 1072 (9th Cir.2010) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.2003) (en banc)). Since *CPLC-II* was decided, the Supreme Court has made clear that exacting scrutiny, not strict scrutiny, is applicable to campaign finance disclosure requirements. *See Reed*, 130 S.Ct. at 1288; *Citizens United*, 130 S.Ct. at 914. In light of this intervening Supreme Court authority, it is clear that *CPLC-II* set the bar too high in applying strict scrutiny. The government need not, as we suggested in *CPLC-II*, employ the least restrictive means to satisfy its interest in providing the electorate with information; it need only ensure that its means are substantially related to that interest. Washington State's disclosure scheme passes that test.

Indeed, it is the Supreme Court's decision in *Citi-*

zens United, rather than the panel decision in *CPLC-II,* that provides the best guidance regarding the constitutionality of the Disclosure Law's requirements. The *Citizens United* Court underscored the fundamental distinction between the burdens imposed by financial regulations, *see Citizens United,* 130 S.Ct. at 897, and those imposed by disclaimer and disclosure requirements, *see id.* at 915-16. Recounting the series of [**50] Supreme Court cases that had upheld disclosure requirements while simultaneously striking down other regulations on campaign speech, the Court affirmed and reiterated the importance of disclosure requirements—even requirements that apply to issue advocacy—to the government's interest in informing the electorate. *Id.*

Like the requirements in *Citizens United,* Washington State's political committee disclosure requirements are not unconstitutionally burdensome relative to the government's informational interest. Rather, they are narrowly tailored such that the required disclosure increases as a political committee more actively engages in campaign spending and as an election nears. First, the registration form required of all political committees is two pages long and elicits basic information about the organization's name, relationship with other organizations, and persons with authority over the organization's finances. Only entities that expect to raise or spend more than $5,000 in a year or receive more than $500 from a single donor are required to submit additional reports. *See* Wash. Admin. Code § 390-16-105 et seq. (limiting the requirements imposed on political committees that meet the enumerated criteria). These comparatively active political committees submit three additional reports,

the timing of which is pegged to the election in which they are engaging. *See* Wash. Rev.Code § 42.17.080. Only if a political committee subject to post-registration reporting raises or spends more than $200 in a given month [**51] must it file a further report providing an update of its financial activities. *See id.* § 42.17.080. These disclosure requirements are not unduly onerous, and their timing and particular informational requirements are substantially related to the government's informational interest.

[*20] Our conclusion here is compelled by our decision in *ARTLC,* in which we held that Alaska's materially identical political committee disclosure requirements survive strict scrutiny. *See ARTLC,* 441 F.3d at 791. If Alaska's disclosure requirements survive strict scrutiny, then, a fortiori, Washington State's disclosure requirements (which promote the same important governmental interest) survive exacting scrutiny. Our *ARTLC* decision was based on three grounds, each of which is equally applicable here. First, we explained that the provisions at issue were not a financial limitation and required "only reporting of contributions to, and of contributions and expenditures by," regulated entities. *Id.* Second, we observed that there was "no allegation in this case that the reporting provisions limit the fundraising ability" of regulated entities. *Id.* (distinguishing *MCFL*). Finally, we noted that, unlike the provisions in *MCFL,* which essentially required major structural changes to an organization, the disclosure provisions applied to ARTLC imposed minimal, if any, organizational burdens. *Id.* We concluded that "[i]n light of the nature of the burdens imposed" by the registration and reporting [**52] requirements, the challenged disclo-

sure provisions passed muster under the First Amendment. *Id.* at 792. Here, too, because the Disclosure Law's somewhat modest political committee disclosure requirements are substantially related to the government's interest in informing the electorate, they survive exacting scrutiny.

c. "Independent Expenditure" and "Political Advertising" Definitions

We next turn to Human Life's contention that the Disclosure Law's definitions for "independent expenditure" and "political advertising" are too expansive to be substantially related to the government's important interest. The Disclosure Law defines "independent expenditure" in terms of money spent "in support of or opposition to" a candidate or ballot initiative, Wash. Rev.Code § 42.17.100, and it defines "political advertising" as mass communications "used for the purpose of appealing, directly or indirectly," for support in any election campaign, *id.* § 42.17.020(38). Human Life argues that these definitions are facially unconstitutional because they encompass issue advocacy instead of extending only to express advocacy or its functional equivalent. Human Life concedes that the government may impose disclosure requirements on a radio advertisement that expressly urges Washingtonians to vote for or against a particular ballot initiative, but it argues that the government may not impose disclosure requirements on advertisements that avoid references to particular ballot [**53] initiatives, and instead speak only about the issues involved in pending ballot initiatives. In other words, Human Life argues that there is a constitutionally significant distinction between an advertisement saying, "physician-assisted suicide is bad policy," at a time

when a measure like Initiative 1000 is on the ballot and an advertisement saying, "vote against Initiative 1000." Human Life's position is that the latter advertisement, which is express advocacy, may be subject to disclosure requirements, whereas the former advertisement is constitutionally sacrosanct issue advocacy that may not be regulated. On this basis, it argues that the burdens imposed by the Disclosure Law's political committee obligations are categorically unconstitutional.[5]

[*21] Arguing that *Buckley* established a distinction between the ability to regulate express and issue advocacy, Human Life cites *WRTL*. In *WRTL*, the Supreme Court considered the constitutionality of a federal limitation on campaign speech that prohibited "electioneering communications" during certain "blackout dates" leading up to an election as applied to three advertisements that WRTL wished to pursue. *WRTL*, 551 U.S. at 464. Although the ads were clearly prohibited by the federal statute, they did not contain "magic words of express advocacy" as [**54] identified in *Buckley*. The Court had already determined in *McConnell* that such magic words were not a prerequisite to regulation and that, as long as the communications were the "functional equivalent" of express advocacy, they fell within the definition of communications constitutionally subject to disclosure. *McConnell*, 540 U.S. at 193-94. Thus, the question before the *WRTL* Court was the scope of the definition of

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[5] Although the Fourth Circuit adopted this position in *Leake*, 525 F.3d at 281-83, its decision predates *Citizens United* and *Reed* and therefore is unpersuasive in the disclosure context.

"functional equivalent."

The Court defined "express advocacy or its functional equivalent" as communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70. The Court concluded that WRTL's ads—which did not discuss an issue in an upcoming election, did not urge their audience to vote for or against any candidate or measure, and merely encouraged citizens to contact their senators and urge them to oppose an ongoing filibuster—were neither express advocacy nor "susceptible of no reasonable interpretation other than as an appeal for a vote." *Id*. at 458-60, 470. Because they did not fall within the express advocacy category that was automatically constitutionally permissible, the Court subjected the regulations to strict scrutiny. Concluding that it had "never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional [**55] equivalent," *id*. at 464-65, the Court held that the ads could not constitutionally be subject to the federal prohibition on electioneering communications, *id*. at 466.

As a preliminary matter, we could arguably dispose of Human Life's challenge to the disclosure requirements by concluding that its communications constitute the functional equivalent of express advocacy under *WRTL*. Human Life's proposed communications, even if they do not mention Initiative 1000 by name, are susceptible of no reasonable interpretation other than as an urgent appeal to vote down the measure. The communications explicitly state that physician-assisted suicide has reentered the realm of public debate and that the situation demands action. Even if

the communications were less obvious, the *WRTL* Court noted that certain background information may be relevant in determining whether a communication can reasonably be interpreted only as relating to a specific election or vote. *Id.* at 473-74. For example, the Court mentioned as a consideration the timing element—that is, if an ad "describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of scrutiny in the near future," it is more likely it should be interpreted as appealing for a vote. *Id.* at 474 (quoting *Wis. Right to Life, Inc. v. FEC,* 466 F.Supp.2d 195, 207 (D.D.C.2006)). Human Life itself admits that timing is particularly relevant to its proposed communications; in elaborating on the burden imposed by the [**56] Disclosure Law, it stated in its verified complaint that "2008 is an especially vital time for HLW to address the physician-assisted suicide issue because people will again be unusually attentive as it swirls to the forefront of public attention." Given their detailed language and unique timing, the communications proposed by Human Life are certainly express advocacy or its functional equivalent. Moreover, the ads cannot be compared with the communications at issue in *WRTL,* which did not involve an issue that was the subject of an election and merely encouraged voters to engage in communication with their representatives.

[*22] However, even if Human Life's proposed communications constitute unadulterated issue advocacy, its argument has been foreclosed by the Supreme Court's opinion in *Citizens United.* Considering the possibility of a bright-line rule distinguishing express and issue advocacy, the Court stated, "[W]e reject Citizen United's contention that the disclosure requirements must be limited to speech that is the functional

equivalent of express advocacy." *Citizens United*, 130 S.Ct. at 915. Citing *Buckley*, *MCFL*, and *McConnell*, the Court emphasized the established principle that "disclosure is a less restrictive alternative to more comprehensive regulations of speech," and it recited the list of decisions in which the Court had upheld disclosure requirements under the same principles it used to strike down financial limitations. *Id.* In addition, the Court explained that the distinction [**57] between express and issue advocacy that was established by the narrowly construed statutory definitions in cases like *WRTL* did not translate into the disclosure context. The Court explained:

> Citizens United claims that ... [t]he principal opinion in *WRTL* limited [BCRA's] restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention. The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech.

Id. (citations omitted). Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable.

In advocating that position, Human Life does no more than reiterate arguments that have been rejected by the Supreme Court. First, in upholding the application of disclosure requirements to electioneering communications, the *McConnell* Court rejected the notion that *Buckley* establishes "a constitutionally mandated line between express advocacy and so-called

issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." *McConnell,* 540 U.S. at 190; *see also id.* at 193 (rejecting the [**58] notion "that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy"). The Court found that this notion "misapprehends our prior decisions" because "a plain reading of Buckley makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *Id.* at 190-91. Also, Human Life's expansive reading of *WRTL* as concluding that issue advocacy cannot be subject to disclosure requirements was rejected in *Citizens United.* Thus, imposing disclosure obligations on communicators engaged in issue advocacy is not per se unconstitutional; instead, the constitutionality of the obligations is determined by whether they are substantially related to a sufficiently important governmental interest.

[*23] Having dispensed with the idea that only express advocacy and its functional equivalent are subject to government regulation, and that any government regulation of issue advocacy is therefore unconstitutional, we turn to the operative question: whether the Disclosure Law's requirements for "independent expenditures" and "political advertising" are substantially related to Washington State's informational interest. We conclude that they are.

In *Citizens United,* the Supreme Court unreservedly affirmed the public's interest "in knowing who is speaking about a candidate shortly before an election," [**59] and it concluded that "the informational interest alone" was sufficient to support federal campaign

finance disclosure requirements.[6] *Citizens United*, 130 S.Ct. at 915-16. Upholding the line of cases that recognize the importance of the government's informational interest, the Court reasoned:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency

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[6] Indeed, the *Citizens United* Court recognized not only the public's interest in knowing who is speaking about a candidate, and which donors might wield influence over a candidate, but also the interest of shareholders in determining "whether their corporation's political speech advances the corporation's interest in making profits." *Citizens United*, 130 S.Ct. at 916. The Court recognized that the value of the information generated by disclosure was not limited to informing voters how to vote, but included providing citizens with the ability "to hold corporations and elected officials accountable for their positions and supporters" and "to react to the speech of corporate entities in a proper way." *Id.*

The reality of this corporate accountability function is illustrated by the public's reaction in August 2010 to a political contribution by Target to an anti-gay gubernatorial candidate. *See* Jia Lynn Yang & Dan Eggen, *Campaign Spending Puts Target in Bull's-Eye*, Wash. Post, Aug. 19, 2010. After disclosure of the contribution sparked an outcry from the gay community, one campaign finance expert suggested that major corporations "are now likely to think twice before giving corporate money to groups that may later prove controversial." *Id.*

> enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Id. at 916.

As in *Citizens United*, Washington voters' interest in knowing who is speaking about physician-assisted suicide shortly before the vote on a ballot [**60] initiative that proposes to legalize that practice is sufficient to support the Disclosure Law's requirements. Under these circumstances, where the "[v]oters act as legislators," *CPLC-I*, 328 F.3d at 1106, the government has a vital interest in providing the public with information about who is trying to sway its opinion. The ability of voters to determine who is behind the advertisements seeking to shape their views is integral to the "full realization of the American ideal of government." *Harriss*, 347 U.S. at 625. Given the complex detail involved in ballot initiatives, and the sheer volume of relevant information confronting voters, voters cannot be expected to make such a determination on their own. Thus, to prevent the public from being misled by special interest groups "masquerading as proponents of the public weal," the voters who passed Washington's Disclosure Law "merely provided for a modicum of information from those" who wish to influence the public's vote. *Id; see also McConnell*, 540 U.S. at 196-97 (noting that groups sometimes use "dubious and misleading names," like "Citizens for Better Medicare," a group funded by the pharmaceutical industry); Editorial, *The Secret Election*, N.Y. Times, Sept. 18, 2010 (noting the ability of 501(c)(4) organizations "with disingenuously innocuous names like American Crossroads and the American Action Network" to serve as "a funnel for anonymous

campaign [**61] donations"). We have no trouble concluding that Washington's interest in informing the electorate through the Disclosure Law is sufficiently important.

[*24] Before analyzing the relationship between the particular burdens imposed by the Disclosure Law and the government interests it furthers, we note that there is less danger of a regulation sweeping too broadly in the context of a ballot measure than in a candidate election. As the district court noted, where a disclosure requirement regulates issue advocacy, the scope of that regulation is naturally "more targeted and limited" when the relevant vote involves a ballot initiative. *Human Life*, 2009 WL 62144, at *18. "Ballot initiatives present a single *issue* for public referendum," and thus the only relevant campaign speech that a disclosure requirement could reach is "speech intended to influence the voter's opinion as to the merits of this single issue—in other words, it is 'issue advocacy,' plain and simple." *Id.* Whereas the broadly defined regulation of campaign speech in the candidate election context "threatens to burden debate on a *broad range* of issues—indeed, any issue that is arguably 'pertinent' to the election," broadly defined speech regulation in the ballot measure context poses a much less significant burden; in the ballot context, the only issue advocacy that could potentially be regulated is advocacy regarding "the *single* issue put before the public." *Id.* Thus, the potential of the Disclosure Law to incidentally regulate issue advocacy, to [**62] which Human Life objects, would engender far more concern if the relevant election involved a candidate. In the ballot initiative context, on the other hand, where express and issue advocacy are arguably "one and the same," any incidental regulation of issue

advocacy imposes more limited burdens that are more likely to be substantially related to the government's interests. Because regulation of issue advocacy in the ballot context is virtually indistinguishable from regulation of express advocacy (an admittedly appropriate enterprise), such regulation is more closely related to the government's interest in informing the electorate. We agree with the district court's reasoning that "[f]rom the perspective of the state's compelling interest," it makes little difference whether speech urges the public to vote for or against a ballot measure implicating a particular issue or whether it advocates or attacks that particular issue while the ballot measure is pending.[7]

The particular requirements of Washington's Disclosure Law are substantially related to the government's informational interest in that they target only those expenditures and advertisements made in conjunction with an ongoing election or vote. Reporting requirements do not extend indiscriminately to all issue [**63] advocacy conducted at any time– regulating, for example, an advertisement about physician-assisted suicide placed at a time when no related ballot measure is pending. Rather, by definition, disclosure obligations do not apply absent a pending election or ballot initiative campaign. *See* Wash. Rev.Code § 42.17.100(1) (defining "independent expenditure" as an expenditure made to support or oppose a "candidate or ballot proposition"); *id.* § 42.17.020(38)

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[7] Compare this to a candidate election, where there is a greater distance between speech urging a vote for or against a particular candidate and advocating or attacking one of a "broad range of issues" on which the candidate may have a particular view.

(defining "political advertising" as communications that support or oppose an "election campaign"). Moreover, once the initial two-page registration form is filed, the filing of additional special reports is pegged to the dates of the upcoming election. For independent expenditures, an initial financial disclosure report is required only if certain financial thresholds are passed "during the . . . election campaign ," and subsequent reporting requirements, which become due as the date of the vote approaches, arise only if additional expenditures have been made during the campaign period. *Id.* § 42.17.100(2)-(3). Similarly, special reports for political advertising are required only if the advertisement has a fair market value of more than $1,000 and the advertisement is run during the three-week run-up to the vote. *See id.* § 42.17.103(1). All disclosure obligations cease shortly after the relevant vote has taken place. *Id.* § 42.17.100(3).

[*25][**64] Thus, under the Disclosure Law, an organization engaging in issue advocacy like Human Life may avoid disclosure requirements any time that the issue about which it is speaking is not the subject of a ballot initiative or other public vote. Once the issue becomes the subject of a ballot initiative campaign, Human Life may continue to advocate all it wants; the only difference is that it must provide certain disclosures at times tied to the date of the vote. Human Life itself recognizes the unique importance of the temporal window immediately preceding a vote. As it stated in its complaint, the year 2008 was "a special opportunity" and "an especially vital time" for it to discuss physician-assisted suicide. It explained that "[b]ecause physician-assisted suicide is now especially in the public awareness and debate, people will be particularly receptive to arguments about the physician-

assisted suicide issue." For the same reasons that Human Life had a heightened interest in speaking about physician-assisted suicide during the run-up to the Initiative 1000 vote, Washingtonians had a heightened interest in knowing who was trying to sway their views on the topic and how much they were willing to spend to achieve that goal. We conclude that the Disclosure Law's requirements for independent expenditures and political advertising are substantially related to [**65] that interest.[8]

C. Vagueness Challenges

"A law is unconstitutionally vague if it fails to provide a reasonable opportunity to know what conduct

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[8] Human Life also challenges the constitutionality of a separate Washington regulation providing that "[a]ny person making a measurable expenditure of funds to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition shall report such expenditure including all costs of preparation and distribution in accordance with chapter 42.17 RCW." Wash. Admin. Code § 390-16-206. Human Life argues that this regulation is unconstitutional because it uses the phrase "for or against" instead of "expressly for or against." We already have rejected Human Life's argument that issue advocacy is not subject to disclosure requirements. In any event, this regulation does not create new disclosure requirements, but rather clarifies that certain communications—including newspaper editorials and news commentaries—are exempt from the Disclosure Law's requirements. *See id.* (cross-referencing Wash. Rev.Code § 42.17.020(15)(b)(iv), (21)(c); Wash. Admin. Code §§ 390-16-313(2)(b), 390-05-290).

is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Tucson Woman's Clinic v. Eden,* 379 F.3d 531, 555 (9th Cir.2004) (citations omitted); *see also Canyon Ferry,* 556 F.3d at 1030 (finding unconstitutional vagueness where an entity "had no way of knowing *ex ante* " that its conduct would be covered by the challenged statute). "Nevertheless, perfect clarity is not required even when a law regulates protected speech," *Cal. Teachers Ass'n v. State Bd. of Educ.,* 271 F.3d 1141, 1150 (9th Cir.2001), and "we can never expect mathematical certainty from our language," [**66] *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Human Life argues that two terms in the Disclosure Law are unconstitutionally vague: "expectation" as used in the definition of "political committee," and "mass communication" as used in the definition of "political advertising." [9] Although vague

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[9] Throughout its briefs, Human Life argues that various Disclosure Law provisions are "vague and overbroad." With the exception of the two terms discussed in this section (i.e., "expectation" and "mass communication"), Human Life's arguments center on the asserted overbreadth of the Disclosure Law's provisions, not their vagueness. This approach is not unusual. *See Kolender v. Lawson,* 461 U.S. 352, 358 n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) ("[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."); *Cal. Teachers Ass'n,* 271 F.3d at 1151 ("A statute's vagueness exceeds constitutional limits if its deterrent effect on legitimate expression is both real and substantial, and if the statute is not readily subject to a narrowing construction by the state courts." (alterations and internal

ness challenges based on a statute's failure to provide the "reasonable opportunity to know what conduct is prohibited" are generally brought where criminal sanctions may be imposed, *see Buckley,* 424 U.S. at 40-41, the Supreme Court has also held that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity," *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (considering a vagueness challenge to a state supreme court's declaratory [**67] judgment, which defined the purview of state laws prohibiting certain solicitations of legal business); *see also Grayned,* 408 U.S. at 109 (considering a vagueness challenge where the appellant was fined $25 for violations of antipicketing and antinoise ordinances, and stating that "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms' " (alterations in original) (footnotes and citations omitted)).[10]

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quotation marks omitted)). We already have addressed Human Life's "overbreadth" arguments above insofar as we have held that the definitions of "independent expenditure" and "political advertising" do not burden more speech than is constitutionally permissible under exacting scrutiny. In this section, we address the two statutory terms that Human Life specifically challenges on vagueness grounds.

[10] The Disclosure Law imposes civil penalties for violations, Wash. Rev.Code § 42.17.390, and does not preclude criminal sanctions where appropriate, *see State v. Conte,* 159 Wash.2d 797, 154 P.3d 194, 198 (Wash.2007).

1. "Expectation"

[*26] An entity qualifies as a "political committee" if it has "the expectation" of spending or receiving money to support or oppose a candidate or ballot initiative. Wash. Rev.Code § 42.17.010. Human Life argues that the word "expectation" is unconstitutionally vague, as it could be interpreted to mean anything from a "hope" to a "contract." We disagree. The meaning of the word "expectation" for the purposes of the Disclosure Law's definition of "political committee" has been clarified through judicial interpretation. First, as discussed above, an entity becomes a political committee under the Disclosure Law's "expenditures" prong if one of its primary purposes is political advocacy. *See Evergreen Freedom Found.*, [**68] 49 P.3d at 902-03. Once an entity demonstrates sufficient political activity to qualify under this standard, there can be little doubt that it will "expect" to make expenditures related to that political activity. Second, an entity becomes a political committee under the "contributions" prong if the entity has given the public "actual or constructive knowledge that the organization is setting aside funds to support or oppose a candidate or ballot proposition." *Id.* at 904. Arguably, an organization would not notify the public that funds would be used for political advocacy if the organization did not expect to receive funds for that purpose. Because the "primary purpose" test and "actual or constructive knowledge" test graft into the word "expectation" the concrete, discernible criteria necessary to prevent arbitrary and discriminatory enforcement, we conclude that the term "expectation" is not unconstitutionally vague.

2. "Mass Communication"

"Political advertising" for purposes of the Disclosure Law encompasses newspaper advertisements, billboards, signs, letters, "or other means of mass communication." Wash. Rev.Code § 42.17.020(38). Human Life argues that the phrase "other means of mass communication" is unconstitutionally vague because it is impossible to determine how broadly distributed a communication must be to fall within the ambit of the statute.

[**69] However, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.' " *Hill v. Colorado,* 530 U.S. 703, 733, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (quoting *United States v. Raines,* 362 U.S. 17, 23, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)). Moreover, "otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity," *Gammoh v. City of La Habra,* 395 F.3d 1114, 1120 (9th Cir.2005), and vagueness challenges will be rejected when it is "clear what the ordinance as a whole prohibits," *Grayned,* 408 U.S. at 110.

"When Congress does not define a term in a statute, we construe that term according to its ordinary, contemporary, common meaning." *United States v. Kilbride,* 584 F.3d 1240, 1257 (9th Cir.2009) (quoting *United States v. W.R. Grace,* 504 F.3d 745, 755 (9th Cir .2007)). "Mass" is defined as "[d]irected at or reaching a large number of people." Webster's II New Riverside Dictionary (1984). "Communication" is defined as "[t]he exchange of ideas, messages, or information, as by speech, signals, or writing" or "[a] system for sending

and receiving messages, as by mail, telephone, or television." *Id.* The only communication proposed by Human Life not expressly covered by the definition of [**70] "political advertising" is its planned telemarketing campaign.[11] We conclude that this campaign clearly falls within the ordinary meaning of "mass communication" and that there is no reason to believe that the scope of that term will be overly vague "in the vast majority of its intended applications." Moreover, given the lengthy list of other similar covered communications, as well as the clear purposes of the Disclosure Law, we find that it is sufficiently evident which communications will be subject to the Disclosure Law's requirements for political advertising. For these reasons, we reject Human Life's contention that "mass communication" is unconstitutionally vague.

D. As-Applied Challenges

[*27] In addition to its facial challenges, Human Life challenges the Disclosure Law as applied to Human Life and its proposed advocacy activities. However, it does so in name only. Human Life does not provide any evidence to support an as-applied challenge, and it does not distinguish between its facial and as-applied claims in its briefs. It does not, for example, explain how the Disclosure Law impinges upon its associational freedoms. *See, e.g., Citizens United,* 130 S.Ct. at 914 (citing *Buckley,* 424 U.S. at 74) (recognizing that the reasonable probability of

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[11] Human Life's proposed letters and radio ads are clearly covered by the statute's enumeration of "letters" and "radio or television presentations" as political advertisements. *See* Wash. Rev.Code § 42.17.020(38).

[**71] harassment as a result of disclosure may be an undue burden on First Amendment rights). Nor does it offer any support for its assertion that Human Life, by its nature, is unable to comply with the Disclosure Law's requirements. *See, e.g., MCFL,* 479 U.S. at 255 (noting that compliance with the federal corporate segregated fund requirements would essentially require MCFL "to assume a more sophisticated organizational form"). Also, as noted above, some of Human Life's proposed communications, which explicitly reference Initiative 1000, constitute "express advocacy" that would be subject to disclosure requirements even if we accepted all of Human Life's constitutional theories.

The factual basis for Human Life's as-applied challenge is to be found, if anywhere, in Human Life's "verified complaint"—its only evidentiary submission. Not only is the complaint devoid of information from which we could conclude that the Disclosure Law is unconstitutional as applied to Human Life, it is not clear from the record that the complaint was verified by a Human Life official with personal knowledge of the facts alleged therein. *See CPLC-II,* 507 F.3d at 1176 (explaining that a verified complaint may serve as an affidavit for purposes of summary judgment if it is based on personal knowledge and sets forth the requisite facts with specificity). Insofar as there is any evidence at all to support an as-applied challenge, that evidence is disputed given the Commission's evidentiary [**72] submissions, which show that Human Life already has in place many of the organizational features required of political committees under the Disclosure Law, and that the reporting requirements imposed by the Disclosure Law are quite modest. The Commission also points out that it has in place proce-

dures by which organizations may obtain guidance on their obligations under the Disclosure Law and that Human Life has not sought any assistance. Any conflicts in the evidence as to Human Life's activities or the severity of the burden imposed on them preclude summary judgment in Human Life's favor. *See* Fed.R.Civ.P. 56.

In essence, Human Life's as-applied argument goes to the relief requested: We understand Human Life's position to be that, if we conclude that the Disclosure Law is unconstitutional on its face, then we should require the district court to enter an injunction specifying that its disclosure requirements cannot be enforced against Human Life or its proposed advocacy activities. Because we conclude that the Disclosure Law is constitutional on its face, we decline to do so.

CONCLUSION

[*28] In his first inaugural address, Thomas Jefferson argued that information is a precondition for public debate, which, in turn, is a precondition for democratic self-governance: "The diffusion of information and the arraignment of all abuses at the bar of public reason, I deem [one of] the essential principles of our [**73] government, and consequently [one of] those which ought to shape its administration." Thomas Jefferson, First Inaugural Address, 1801; *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 411, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (Thomas, J. dissenting) ("Our Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information."). Consistent with Jefferson's vision, disclosure requirements have become an important part of our First Amendment tradition. *See, e.g., Reed,*

130 S.Ct. at 2818; *Citizens United*, 130 S.Ct. at 908; *Harriss*, 347 U.S. at 625. The Disclosure Law represents Washingtonians' considered judgment that "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society" Wash. Rev.Code § 42.17.010(11). There is a substantial relationship between Washington State's interest in informing the electorate and the definitions and disclosure requirements it employs to advance that interest. Accordingly, the judgment of the district court is **AFFIRMED.**

[Doc. 85, filed January 23, 2010]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUMAN LIFE OF WASHINGTON, INC., Plaintiff-Appellant,	)	
	)	Civil Action No. C08-0590
v.	)	
BRUMSICKLE, et al., Defendants-Appellees.	)	

ORDER ENTERING JUDGMENT

THIS MATTER comes before the Court following the Court's denial of summary judgment to the Plaintiff (Dkt. No. 82), on the Plaintiff's motion for entry of judgment pursuant to CR 58 (Dkt. No. 83), and on the State Defendants' response (Dkt. No. 84). The parties agree that, in light of the Court's denial of summary judgment, there are no genuine factual disputes remaining for trial. Therefore, the Court hereby GRANTS judgment in favor of the State Defendants and DISMISSES this action with prejudice.

DATED this 23rd day of January, 2009.

JOHN C. COUGHENOUR

UNITED STATES DISTRICT JUDGE

[***Editor's Note:*** *Page numbers from the online citation, 2009 WL 62144 [*] and the unreported opinion [**], are indicated. Only the Westlaw citation is available as of this printing*]

[Doc. 82, filed January 8, 2010]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUMAN LIFE OF WASHINGTON, INC., Plaintiff-Appellant,	)	
	)	Civil Action No. C08-0590
v.	)	
BRUMSICKLE, et al., Defendants-Appellees.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

JOHN C. COUGHENOUR, District Judge.

[*1][**1] This matter comes before the Court on Plaintiff's Motion for Summary Judgment (Dkt.Nos.66, 67), the State Defendants' Response (Dkt. No. 70), and Plaintiff's Reply (Dkt. No. 78). Having considered the parties' briefing and supporting documentation, the Court has determined that oral argument is unnecessary and hereby finds and rules as follows.

I. BACKGROUND

A. Washington State Disclosure Requirements

[**2] In 1972, Washington voters passed Initiative Measure No. 276, which established the state's Public Disclosure Commission ("PDC") and laid the framework for Washington's campaign finance laws. Washington Revised Code § 42.17.010 states the public policy behind the statutory framework, including:

> (1) That political campaign ... contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.
>
> ....
>
> (10) That the public's right to know of the financing of political campaigns ... far outweighs any right that these matters remain secret and private.

Id. The policy declaration directs that the measure's provisions "be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns ... so as to assure continuing public confidence of fairness of elections ... and so as to assure that the public interest will be fully protected." *Id.*

The state's current statutory framework contains special registration and disclosure requirements for "political committees." A "political committee" is defined as "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." WASH. REV.CODE § 42.17.020(39). This definition contains two alternative prongs: an organization can qualify based on an expectation of "receiving contributions" or

an expectation of "making expenditures." *Evergreen Freedom Found. v. Wash. Educ. Ass'n (EFF)*, 111 Wash.App. 586, 49 P.3d 894, 902-03 (Wash.Ct.App.2002). However, each of these prongs has been substantially narrowed through judicial construction. Washington state courts have held that an organization will only qualify as a "political committee" based on an expectation of *receiving* political *contributions* if its contributors have "actual or constructive knowledge" that their funds will be used for electoral political activity. [**3] *See id.* at 905.[1] To qualify as a "political committee" based on an expectation of *making* political *expenditures*, an organization must have as "its primary or one of its primary purposes" to support or oppose political campaigns. *See id.* at 903 (internal quotation omitted).

If a group qualifies as a "political committee," it must appoint a treasurer and establish a bank account in the state, WASH. REV.CODE § 42.17.050, .060, and must file a "statement of organization" with the PDC disclosing the names of its officers and any related or affiliated committees or persons, the candidate or ballot proposition that the committee is supporting or opposing, and other information regarding the committee's structure, *id.* § 42.17.040. If the committee in-

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[1] For example, an organization becomes a "political committee" under this prong if it solicits contributions for a political purpose, if it segregates funds for political purposes, if its organizational documents indicate that it expects to receive political contributions and it has taken steps to implement that expectation, or if it self-identifies to the PDC as a "political committee." (Rippie Decl. ¶ 35 (Dkt. No. 47 at 18).)

tends to raise and spend more than $5,000 in a calendar year or if it intends to raise more than $500 from any one contributor (*see* Rippie Decl. ¶ 43 (Dkt No. 47 at 22)), that committee must make regular reports disclosing, among other things, (1) its funds on hand; (2) the value of any contributions received and the names and addresses of the contributors; and (3) the amounts of any expenditures, the recipients of those expenditures, and the intended purpose. WASH. REV.CODE § 42.17.080, 42.17.090.

[*2] Groups that do not qualify as "political committees" must still disclose certain political expenditures. Washington Revised Code § 42.17.100 defines an "independent expenditure" as "any expenditure that is made in support of or in opposition to any candidate or ballot proposition" and is not already required to be disclosed under the rules governing political committees. *Id.* § 42.17.100(1). If any entity incurs more than one hundred dollars of "independent expenditures" in a single campaign or makes an independent expenditure whose value cannot reasonably be estimated, the entity must report the values and recipients of the [**4] expenditures to the PDC within five days and must thereafter report any additional independent expenditures for the remainder of the campaign in question. *See id.* § 42.17.100(2)-(4).

Washington's statutory framework also contains special requirements for "political advertising," defined to include "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election

campaign." *Id.* § 42.17.020(38). All radio and television political advertising must include its sponsor's name; all written political advertising must include its sponsor's name and address; and all political advertising that constitutes an independent expenditure must explain that it was not authorized by a candidate and, if sponsored by an organization, must identify the organization's top five contributors. *Id.* § 42.17.510; *see also* WASH. ADMIN. CODE § 390-18-010. If political advertising "supporting or opposing a candidate or ballot initiative" is presented to the public within twenty-one days of the election and costs more than one thousand dollars, its sponsor must report the expenditure to the PDC within twenty-four hours of the presentation. *Id.* § 42.17.103.

Finally, Washington Administrative Code § 390-16-206 explains when a "rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition" must be treated as a reportable expenditure. News media items, features, commentaries, editorials, letters to the editor, and replies thereto, are *not* considered expenditures and need not be reported as such. WASH. ADMIN. CODE § 390-16-206(1), 390-16-313(2)(b), 390-05-290; WASH. REV.CODE § 42.17.020(15)(b)(iv), (21)(c). In all other cases, if and only if an entity makes a "measurable expenditure of funds to communicate" a rating, evaluation, endorsement, or recommendation, the entity must report it as an expenditure according to the general reporting provisions of Washington Revised Code chapter 42.17 outlined above. WASH. ADMIN. CODE § 390-16- 206(1).

B. Human Life of Washington and Initiative I-1000

[*3][**5] Human Life of Washington ("Plaintiff" or "HLW") is a nonprofit organization incorporated in Washington State. (Compl. ¶ 13 (Dkt. No. 1 at 4).) HLW's "mission is to reestablish throughout our culture, the recognition that all beings of human origin are persons endowed with intrinsic dignity and the inalienable right to life from conception to natural death." (*Id* .) In 1980, HLW created the Human Life Political Action Committee ("HLPAC"), "a political committee connected to Human Life" that would "participate directly in the endorsement of and assistance to, both financially and through campaign involvement, individual candidates running for office." (Krier Decl. Exh. A-1 (Dkt. No. 74 at 6).) HLPAC has, at various times, registered with the PDC as a "political committee," (Parker Decl. ¶ 11 (Dkt. No. 53 at 9:4)), and has filed required disclosure reports with the PDC, (*id.* ¶ 7).

In 1991, Washington voters considered Initiative 119, which would have amended the state constitution to legalize physician-assisted suicide. (Compl. ¶ 18 (Dkt. No. 1 at 5-6).) In that campaign, HLPAC appears to have made numerous direct expenditures to oppose the Initiative, and HLW itself also made contributions to several other political committees in opposition. (Parker Decl. ¶ 8 (Dkt. No. 53 at 4-5).) The Initiative was ultimately defeated.

In 2008, Washington voters considered a similar ballot initiative, I-1000, which proposed to "permit terminally ill, competent, adult Washington residents medically predicted to die within six months, to request and self-administer lethal medication prescribed

by a physician." (Compl. ¶ 20 (Dkt. No. 1 at 6-7).) HLPAC explicitly opposed I-1000. *See* Press Release, Human Life PAC, HL PAC Endorsements (July 2008), *available at* http://humanlife.net/view_reports.htm?rpid=31 (last visited Oct. 24, 2008). The initiative appeared on the November 4, 2008 ballot and was passed.

HLW brought this lawsuit in April 2008, before I-1000 had officially qualified for the ballot, against the five members of the PDC, Washington State's attorney general, and King County's prosecuting attorney. (Compl. 1 (Dkt. No. 1).) In the complaint, HLW alleged that it [**6] wished to engage in "issue advocacy" concerning physician-assisted suicide. (*Id.* ¶ 1.) "Because Physician-assisted suicide is now especially in the public awareness and debate [in light of I-1000], people will be particularly receptive to arguments about the physician-assisted suicide issue, making 2008 an important time for HLW to advocate concerning prolife issues." (*Id.* ¶ 21.) Although the timing of HLW's advocacy was meant to coincide with the I-1000 campaign, it allegedly would not explicitly oppose the initiative. (*Id.* ¶¶ 27-29.)

In the complaint, HLW proposed three specific avenues of advocacy that it intended to pursue. (*Id.* ¶¶ 22-25.) First, the complaint attached an "issue-advocacy fundraising letter" that HLW intended to post on its website and mail or e-mail to a list of potential donors. (*Id.* ¶ 22.) The letter provides:

> [*4] The assisted suicide issue just won't go away. But neither will we. We are here to argue the prolife side on your behalf. However, as this grisly issue heats up again in 2008, Human Life of Washington needs your help to

> pay for some radio ads to educate the public.

(Fundraising Letter at 1 (Dkt. No. 1 at 22).) The letter explicitly references Initiative 119 before stating that "[n]ow, while their minds are focused on the issue, is the opportune time to educate [the people of Washington] on the dangers of assisted suicide–and on the value of every life." (*Id.*) The letter alleges several statistics and anecdotes about Oregon's use of physician-assisted suicide and then states that "The public needs to receive this sort of information as assisted suicide advocates once again offer biased, inaccurate, and rosy depictions of this grisly practice." (*Id.*) Finally, the letter requests that donors send funds to help support HLW's advocacy efforts. (*Id.*)

Second, the complaint describes a "telephone fundraising script" that HLW intended to use to solicit donors over the phone. (Compl. ¶ 23 (Dkt. No. 1 at 7).) After introducing themselves as a representative from HLW, the caller would state:

> Right now we are trying to reach every pro-life household in Washington with an urgent update. As you've probably heard, former Governor Booth Gardner is trying to get an initiative on the ballot this fall that would legalize physician-assisted suicide in the State of Washington. We fear that many Washingtonians [**7] do not know the grisly facts about physician-assisted suicide and its devastating effect on the culture of life.
>
> We need your help at this critical time to get the truth out....
>
> ....

> We must protect the most vulnerable citizens of our state and we must ensure that patients can trust physicians. Physicians are to be care givers, not life takers. That is why we're pleading for your help.

(Telephone Script (Dkt No. 1 at 24).)

Third, the complaint includes the scripts of four hypothetical radio ads that HLW intended to broadcast. (Compl. ¶ 24 (Dkt. No. 1 at 7).) One of the ads is entitled "Settled," and is a dialogue between a male and a female speaker:

> M: Assisted suicide is back in the news!
>
> F: Didn't we settle that issue?
>
> M: We *rejected* a ballot measure.
>
> F: Has anything changed?
>
> M: We know more about the dangers.
>
> F: Such as?
>
> M: A new study said one doctor did 23 of the 28 assisted suicides at an Oregon hospice.
>
> F: Sounds like a Kevorkian!
>
> M: And it said one man seemed rushed into it ... then took hours to die after the drugs. Wife left ... couldn't take it ... so depressed that *she* attempted suicide.
>
> F: All reasons *not* to reconsider the issue.
>
> Narrator: Paid for by Human Life of Washington.

(HLW Ads (Dkt. No. 1 at 25) (emphasis in original).) Another ad is entitled "Trust":

> F: Whatever happened to the Hippocratic Oath?

> [*5] M: You mean the part that says, "I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect?"
>
> F: Exactly. It was a quantum leap in medicine when you knew that you could always trust your doctor. Before that, who knew whether he'd been hired by a family member to hurry up the inheritance?
>
> M: That trust is the foundation of medicine.
>
> F: Assisted suicide removes it ... turns doctors into killers. That's dangerous.
>
> Narrator: Paid for by Human Life of Washington.

(*Id.*)

[**8] The specific examples provided in the complaint were not intended to be exclusive; rather, HLW allegedly intended to do "these and substantially-similar fundraising and public communications in support of its Physician-assisted suicide issue advocacy in 2008." (Compl. ¶ 25 (Dkt. No. 1 at 7-8).) The complaint explained that the "substantially similar" fundraising and communications had not yet been created and would vary as the public debate on the issue evolved. (*Id.*)

HLW argues that it has a constitutional right to engage in this sort of "issue advocacy" without submitting to Washington State's disclosure requirements. (*Id.* ¶ 38.) HLW claims to reasonably fear that the PDC would consider HLW to be a "political committee" under Washington Revised Code § 42.17.020(39) if it undertook its proposed actions, or would consider the individual actions themselves to be "independent

expenditures" under Washington Revised Code § 42.17.100, "political advertising" under § 42.17.020 (38), or "rating[s], evaluation[s], endorse-ment[s], or recommendation[s] for or against ... a ballot measure" under Washington Administrative Code § 390-16-206. (*Id.* ¶¶ 34-37.) Because any such determinations by the PDC would subject HLW to disclosure requirements under Washington State law and civil penalties for noncompliance, HLW claims that it is chilled from engaging in protected First Amendment activities as a result of the State's campaign finance laws. (*Id.* ¶ 38.)

On April 18, 2008, HLW moved for a preliminary injunction to prohibit enforcement of Washington State's reporting and disclosure requirements, both facially and as applied to Plaintiff and its proposed "issue advocacy." (Dkt. No. 8.) The Court held that HLW had standing to bring its claims (Prelim. Inj. Order at 3-5 (Dkt. No. 59)); however, it ultimately denied the motion, finding that Plaintiff had failed to establish a probable likelihood of success on the merits and that the interests of the State and the public outweighed the potential harm to HLW, (*id.* at 5-9).

[**9] HLW now moves for summary judgment, claiming that "[t]here are no material facts in dispute[2]

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[2] HLW's motion provides only cursory facts and instead sets forth its factual allegations in a separately-filed Statement of Material Undisputed Facts. (Dkt. No. 68). Defendants argue that the Statement of Material Undisputed Facts should be struck "[b]ecause this pleading is not among those authorized by Fed.R.Civ.P. 7 and Local Rule 7, and because this Court's July 15 Minute Order (Dkt. No. 65) did not allow any overlength briefs." (Response 2 (Dkt. No.

and HLW is entitled to judgment as a matter of law." (Mot. 1 (Dkt. No. 67).)

II. DISCUSSION

A. Legal Standard

Under Federal Rule of Civil Procedure 56(c), the Court shall grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "In determining whether summary judgment is appropriate, we view the facts in the light most favorable to the non-moving party and draw reasonable inferences in favor of that party." *Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781, 784 (9th Cir.2007).

B. Justiciability

1. Ripeness and Standing

[*6] Defendants first argue that "HLW has failed to state facts of sufficient specificity to demonstrate an actual controversy," (Response 12 (Dkt. No. 70)), as required under the constitutional doctrines of ripeness and standing. *See Thomas v. Anchorage Equal Rights*

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70).) The Court agrees, and hereby STRIKES Plaintiff's Statement of Material Undisputed Facts. However, because the facts contained in this document were, for the most part, all presented in Plaintiff's Verified Complaint, (Reply 1 (Dkt. No. 78) (noting that the Statement of Material Undisputed Facts merely "stat[es] in convenient form the facts from the *Verified Complaint.*")), the Court's summary judgment analysis is unaffected.

Comm'n, 220 F.3d 1134, 1139 (9th Cir.2000) ("Whether the question is viewed as one of standing or ripeness, the Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional 'case or controversy,' that the issues presented are definite and concrete, [**10] not hypothetical or abstract." (internal quotation omitted)). Defendants claim that HLW has not specified with sufficient certainty the advocacy actions that it intended to take. (Response 11-12 (Dkt. No. 70).) They note that the Complaint, after describing specific fundraising and advertising scripts, states only that "HLW intends to do these *and substantially-similar* fundraising and public communications." (Compl. ¶ 25 (Dkt. No. 1 at 7-8) (emphasis added).) They point to deposition testimony by HLW's CEO that the organization was "not tied to those four specific [advertising] scripts." (Kennedy Dep 92:3-5 (Dkt. No. 71 at 31).) Finally, Defendants note that the text of HLW's proposed radio scripts were prepared "in discussion with attorneys" (*id.* at 101), suggesting that the language was concocted specifically for this legal challenge, (Response 12 (Dkt. No. 70).)

The Court rejected a similar justiciability argument when ruling on HLW's motion for preliminary injunction. (Prelim. Inj. Order 3-5 (Dkt. No. 59).) The Ninth Circuit has recognized that in First Amendment challenges, "the Supreme Court has dispensed with rigid standing requirements." *Cal. Pro-Life Council, Inc. v. Getman (CPLC I)*, 328 F.3d 1088, 1094 (9th Cir.2003). In such a case, "self-censorship" will constitute a "constitutionally sufficient injury," *id.* at 1093, if Plaintiff has established "an actual and well-founded fear" that the challenged statute will be enforced against it, *id.* at 1095. A well-founded fear of prosecu-

tion exists whenever the "intended speech arguably falls within the statute's reach." *Id.*

As the Court has already recognized, HLW's proposed actions all "arguably" fall within the reach of the challenged Washington disclosure statutes. (Prelim. Inj. Order 4-5 (Dkt. No. 59).) HLW intended to run advertisements opposing physician-assisted suicide just as Washington voters were debating the legalization of that very conduct; as a result, HLW's actions were at least arguably made "in . . . opposition to" the I-1000 ballot initiative. If so, HLW arguably would have qualified as a "political committee" under state law, *see* WASH. REV.CODE § 42.17.020(39) (defining a "political committee" as "any person (except a candidate or an individual dealing with his or her own funds or property) having the [**11] expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition"), and its intended advertising expenditures might have qualified as "independent expenditures," *see id.* § 42.17.100(1) ("[T]he term 'independent expenditure' means any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported . . . ."), or as "political advertising," *see id.* § 42.17.020(38) (" 'Political advertising' includes any advertising . . . used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign."). Finally, although more of a stretch, at least one of HLW's proposed advertisements could arguably be considered a "rating, evaluation, endorsement or recommendation" against I-1000 subject to Washington Administrative Code § 390-16-206. (*See, e.g.*, HLW "Settled" Ad (Dkt. No. 1 at 25) (noting that "[a]ssisted suicide is back in the

news" after Washington voters previously *"rejected* a ballot measure" and providing several reasons *"not* to reconsider the issue" (emphasis in original)).)

[*7] Plaintiff's proposed actions are sufficiently concrete to render the case justiciable. HLW produced (1) a written fundraising letter, (2) a telephone fundraising script, and (3) four broadcast radio scripts. (Compl. ¶ 22-24 (Dkt. No. 1 at 7).) That HLW intended to engage in "these *and* substantially-similar fundraising and public communications" (*id.* ¶ 25 (emphasis added)) did not render the specific proposed actions any less concrete. Similarly, the Court finds the case justiciable, even if HLW was "not tied to those four specific scripts." (Kennedy Dep. 92:3-5 (Dkt. No. 71 at 31).) Plaintiff desired to engage in a broad debate with Washington voters, but self-censored itself out of fear of government regulation. (Compl. ¶¶ 19, 34-37 (Dkt. No. 1).) To establish standing, Plaintiff need not predict every last expressive position that it would have taken in the debate; that would set an impossibly high bar for Plaintiffs, given the fluid nature of political and philosophical discourse. (*See id.* ¶ 25 ("[I]t is in the nature of issue advocacy that the need to convey information and educate varies as [**12] public debate on an issues varies, so . . . it is impossible to predict [exactly] what future issue-advocacy might be required ....") (internal quotation omitted).) To raise a justiciable claim, Plaintiff need only provide a "concrete plan" of action that would implicate the government's regulatory scheme. *See CPLC I,* 328 F.3d at 1094. The Complaint maintained that all of HLW's issue advocacy would be "substantially similar" to the specifically proposed actions, and nothing in the record suggests that any of HLW's actions would have materially differed from the scripts it provided. (Compl. ¶ 25 (Dkt.

No. 1).) Therefore, the Court finds that HLW's proposed actions constituted a sufficiently "concrete plan" to bless Plaintiff with standing.

Finally, the Court finds it unremarkable that HLW's advertising scripts were drafted in "discussion with attorneys." (Kennedy Dep. 101 (Dkt. No. 71 at 33).) This is a nuanced area of the law, where the state has a well established power to regulate speech, *see Buckley v. Valeo,* 424 U.S. 1, 13, 96 S.Ct. 612, 46 L. Ed.2d 659 (1976) (per curiam), and where the state's power sometimes turns on fine distinctions in the content of the regulated speech, *see, e.g., FEC v. Furgatch,* 807 F.2d 857, 863-64 (9th Cir.1987). Given the legal ramifications of HLW's proposed phrasing, Plaintiff's discussion with its attorneys in drafting the language of its ads does not raise any suggestion of bad faith.

2. Mootness

Although the November 4, 2008, election has come and gone, HLW's claim is not moot. *See Ala. Right to Life Comm. v. Miles (ARTLC),* 441 F.3d 773, 779-80 (9th Cir.2006); *CPLC I,* 328 F.3d at 1095 n. 4; *Porter v. Jones,* 319 F.3d 483, 490 (9th Cir.2003). "[E]lection cases often fall within the 'capable of repetition, yet evading review' exception to the mootness doctrine . . . ." *ARTLC,* 441 F.3d at 779 (internal quotation omitted). That exception applies where "(1) the challenged action was too short in duration to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Porter,* 319 F.3d at 489-90. The Ninth Circuit has repeatedly noted that "the inherently brief duration of an election is almost [**13] invariably too short to

enable full litigation on the merits." *Id.* at 490; *CPLC I,* 328 F.3d at 1095 n. 4 (*quoting Porter,* 319 F.3d at 490); *ARTLC,* 441 F.3d 779 (*quoting CPLC I,* 328 F.3d at 1095 n. 4). Moreover, HLW has asserted its continuing intention to advocate for an "inalienable right to life from conception to natural death" "as it has in the past." (Compl. ¶¶ 1, 13 (Dkt. No. 1).) The Court finds a reasonable expectation that HLW may, at some point, again desire to advocate on the topic of a future Washington State ballot initiative in a manner arguably covered by the State's disclosure requirements. *See ARTLC,* 441 F.3d at 779-80. Therefore, the instant action is not moot.

C. Merits

[*8] Political speech is at the core of the First Amendment. A functioning democracy relies on passionate advocacy, and a robust "marketplace of ideas" requires free and open debate concerning issues of political concern. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," and hence is afforded "the broadest protection" under the First Amendment. *Buckley,* 424 U.S. at 14.

First Amendment protection, however, is not absolute. *Id.* at 25. The government may regulate protected speech, so long as the restrictions are justified, meaning that they survive judicial scrutiny under the applicable standard of review. "[T]he severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court." *Ala. Independence Party v. Alaska,* 545 F.3d 1173, 1177 (9th Cir.2008) (internal quotation omitted). "Severe" burdens on protected speech are reviewed

under strict scrutiny—they must be narrowly tailored to serve a compelling state interest. *Id.* Lesser burdens on protected speech have been reviewed under less rigorous scrutiny. *See, e.g., McConnell v. FEC,* 540 U.S. 93, 136, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (holding that contribution limits need only satisfy "the lesser demand of being 'closely drawn' to match a 'sufficiently important interest' " (internal quotations omitted)); *Buckley,* 424 U.S. at 64 (subjecting disclosure requirements to "exacting [**14] scrutiny," whereby there must exist a "relevant correlation" or "substantial relation" between the governmental interest and the burden imposed). Although courts have often treated these as distinct standards, they are somewhat fluid in practice. Each standard considers the *degree* of burden imposed on the speaker—the more significant the burden, the more compelling the state interest needed to justify that burden. *See, e.g., ARTLC,* 441 F.3d at 791 (applying strict scrutiny to reporting and disclosure requirements, but upholding the provisions in part because the burdens were "not particularly onerous").

Restrictions on speech must also not be unconstitutionally vague. Vagueness challenges can take either of two forms. First, a statute's phrasing might simply be "so indefinite [that it] fails to clearly mark the boundary between permissible and impermissible speech." *Buckley,* 424 U.S. at 41 (holding that the prohibition on certain expenditures "relative to" a candidate was vague in this manner). These sorts of vagueness challenges are generally limited to criminal statutes, *see id.* at 40-41; Richard H. Fallon, Jr., *Making Sense of Overbreadth,* 100 Yale L.J. 853, 903-04 (1991) ("Vagueness doctrine, in its most famil-

iar form, holds that criminal prohibitions, at least, may not be enforced when they are so unclear that people of ordinary intelligence would need to guess at whether their conduct was or was not forbidden."), and may be resolved through narrowing constructions, *see, e.g., Buckley,* 424 U.S. at 42 (reading "the phrase 'relative to' a candidate ... to mean 'advocating the election or defeat of ' a candidate"). The second type of vagueness challenge is often described as a subset of the related First Amendment overbreadth doctrine. *See* Fallon, *supra,* at 904; *Kolender v. Lawson,* 461 U.S. 352, 358 n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) ("[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."). Under this theory, a statute is deemed unconstitutional on its face if it "chills" a "substantial amount of legitimate speech." *Cal. Teachers Ass'n v. State Bd. of Educ.,* 271 F.3d 1141, 1152 (9th Cir.2001) ("A statute's vagueness exceeds constitutional limits if its deterrent effect on legitimate expression is both real and substantial, and if the statute is not readily subject to a narrowing construction by the [**15] state courts." (internal quotation omitted)); *see also Buckley,* 424 U.S. at 42-44 (further narrowing the definition of "advocating the election or defeat of" a candidate to include only *express* advocacy because the broader definition could substantially chill the general discussion of public issues).

[*9] HLW challenges Washington's reporting requirements for "political committees," disclosure requirements for "independent expenditures" and "political advertising," and its treatment of "ratings, evaluations, endorsements, and recommendations." The Court considers each of these four challenges in turn.

1. Reporting Requirements for "Political Committees"

HLW focuses its challenge primarily on Washington's requirements for "political committees," which it refers to as "PAC-style" reporting and disclosure. (Mot. 4 (Dkt. No. 67).)[3] Washington requires "political committees" to appoint a treasurer, establish a bank account in the state, and register with the PDC by filing a "statement of organization," which must be updated as material facts change. WASH. REV.CODE § 42.17.040, .050, .060. For many organizations—those that raise and spend less than $5,000 per year and that do not accept more than $500 from any single contributor—these are the only requirements that attach from "political committee" status. (Rippie Decl. ¶ 26 (Dkt. No. 47 at 14) (noting that such organizations qualify for "mini reporting").) All other, more active "political committees" must file regular reports with the PDC to disclose their contributions, expenditures, and funds on hand. WASH. REV.CODE § 42.17.080, .090.

To qualify as a "political committee," an organization must satisfy either of two prongs. First, an organization is a "political committee" if it has an "expectation of *receiving contributions* ... in support of, or opposition to, any candidate or any ballot proposition." WASH. REV.CODE § 42.17.020(39). To qualify under this prong, the organization must have [**16] taken some step to give its contributors "actual or constructive knowledge" that donated funds will be used for electoral political activity. *EFF,* 49 P.3d at 905. Second, an organization is a "political committee"

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[3] "PAC" stands for "political action committee".

if it has "an expectation of ... *making expenditures* in support of, or opposition to, any candidate or any ballot proposition." WASH. REV.CODE § 42 .17.020(39). To qualify under this second prong, the organization must have as "one of its primary purposes" to support or oppose political campaigns. *EFF,* 49 P.3d at 903.

HLW argues that Washington's PAC-style requirements do not survive strict scrutiny and that the state's definition of "political committee" is vague and overbroad.

(a) "Strict Scrutiny" vs. "Exacting Scrutiny"

As an initial matter, the parties disagree as to which standard the Court should employ in considering whether Washington's "political committee" requirements are justified. HLW argues that the imposition of PAC-style requirements must satisfy "strict scrutiny," i.e., it must be "narrowly tailored" to achieve a "compelling" government interest. *FEC v. Wis. Right to Life, Inc. (WRTL),* --- U.S. ----, ----, 127 S.Ct. 2652, 2664, 168 L.Ed.2d 329 (2007). In contrast, Defendants argue that it need only meet "exacting scrutiny," which requires a "substantial relation ... between the governmental interest and the information required to be disclosed." *ARTLC,* 441 F.3d at 787 (internal quotation omitted).

[*10] The Ninth Circuit has recognized that "the Supreme Court has been less than clear as to the proper level of scrutiny" for PAC-style requirements, *CPLC I,* 328 F.3d at 1101 n. 16; *see also ARTLC,* 441 F.3d at 787 (noting again that the "degree of scrutiny ... is somewhat unclear"); however, it has resolved that ambiguity in favor of strict scrutiny. In *CPLC I,* the Court held that California's PAC-style requirements on ballot-initiative political committees should be sub-

jected to strict scrutiny and remanded to the district court to conduct the analysis in the first instance. 328 F.3d at 1101 n. 16, 1104. Later, in *ARTLC,* another Ninth Circuit panel suggested that *McConnell* might have relaxed the degree of scrutiny since *CPLC I,* but the Court nonetheless "assume[d] without deciding that strict scrutiny applie[d]." 441 F.3d 787 [**17]-88. Finally, in *Cal. Pro-Life Council, Inc. v. Randolph (CPLC II),* 507 F.3d 1172 (9th Cir.2007), when the district court's application of strict scrutiny was back to the Ninth Circuit on appeal, the Court explicitly held that strict scrutiny should still apply. *Id.* at 1177-78. In a footnote, the Court noted that it was "bound by the 'law of the case' to apply strict scrutiny," *id.* at 1177 n. 5, but the opinion's text also makes clear that *CPLC I* is still binding precedent. *Id.* at 1178 ("Because ... the *McConnell* decision [did not] call[ ] into question the analysis [of the cases relied upon in *CPLC I*], we are not compelled to abandon the standard adopted in [*CPLC I*] ."). As a result, the Court finds that it is bound by *CPLC I* and *CPLC II* to apply strict scrutiny to Washington's PAC-style requirements.

(b) Strict Scrutiny Applied: Burdens and Interests

Although *CPLC I* and *II* make clear that strict scrutiny should apply to PAC-style requirements, the cases do not explicitly demonstrate how to apply such scrutiny in practice. In *CPLC I,* the Court remanded to the district court to apply strict scrutiny after further development of the factual record. 328 F.3d at 1105, 1107. On remand, however, rather than develop a factual record to support its regulations, the State of California simply argued that it could impose its

requirements on CPLC as a matter of law, pointing to federal campaign finance laws that required "all groups organized in corporate form, including non-profit corporations, to channel express campaign advocacy through PACs." *See CPLC II,* 507 F.3d at 1187. On appeal, the Ninth Circuit acknowledged that courts had upheld broad imposition of PAC-style requirements on corporate campaign speech, but noted that each of those cases applied to *candidate elections* and explained that "it is not at all certain that the Supreme Court would apply the same criteria to ballot measure advocacy." *Id.* at 1187-88. Because this was California's sole argument, the Court found that the state had "not satisfied its burden" of demonstrating that its PAC-style requirements were narrowly tailored to its compelling informational interest. *Id.* at 1187. The Court made clear that one cannot "ignore the distinction between candidate and ballot measure elections." *Id.* at 1187. However, in holding California [**18] to its failed burden, the Court never actually analyzed whether the state's compelling interest *could* have justified its PAC-style requirements in the ballot initiative context.

[*11] The Ninth Circuit did apply strict scrutiny to PAC-style requirements in *ARTLC.* 441 F.3d 773. Unlike *CPLC I* and *CPLC II,* that case did not involve ballot initiatives, but its analysis is informative nonetheless. In *ARTLC,* the Court reviewed reporting and disclosure requirements that applied to certain nonprofit, ideological corporations that wished to influence the outcome of an election. *Id.* at 779. The State of Alaska required these corporations to (1) register with the state's election commission and make regular reports, (2) report all expenditures and contri-

butions, (3) notify contributors and potential contributors that contributions may be used to influence an election, and (4) disclose the source of their expenditures within the relevant communications. *Id.* at 789-91. In applying strict scrutiny, the Court " 'look[ed] to the extent of the burden ... place[d] on individual rights,' " *id.* at 791 (*quoting Buckley*, 424 U.S. at 68), and found that the burdens imposed under Alaska's statute were "not particularly onerous," *id.* In upholding Alaska's PAC-style requirements, the Court emphasized that they did not impose any limits on the organization's ability to solicit funds, nor did they require broad structural changes like the use of "segregated funds" for political activity. *Id.* at 791 (distinguishing Alaska's requirements from those struck down by the Supreme Court in *FEC v. Mass. Citizens for Life (MCFL)*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986)).

ARTLC applied to candidate elections, so this Court is sensitive to not apply that holding directly to ballot measures, where the state has somewhat different interests. *See CPLC II*, 507 F.3d at 1188. That said, the *burden* of PAC-style requirements are the same regardless of whether the organization's advocacy relates to a candidate election or a ballot initiative. Therefore, this Court gives great weight to the Ninth Circuit's finding in *ARTLC* that PAC-style requirements are "not particularly onerous." 441 F.3d at 791. Washington's "political committee" requirements are similar to those upheld in *ARTLC* and contain neither of the more severe burdens on solicitation or segregation of funds that the courts flagged in that case. *See* [**19] *id.* The only notable difference between the Washington and Alaska provisions is that Washington

also requires "political committees" to (1) designate a treasurer (i.e., someone at the committee who will be "responsible for ... complying with the disclosure requirements" (Response 15 (Dkt. No. 70))) and (2) maintain an in-state bank account. Defendants convincingly argue that these minor burdens are necessary for enforcement and "nothing more than the basic administrative infrastructure necessary to implement the disclosure requirements." (*Id.* at 18.)

Washington has also significantly narrowed its reporting and disclosure requirements to focus only on the most active political committees. First, to qualify as a political committee under the "maker of expenditures" prong, the organization "must have as its primary or one of the primary purposes to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *EFF,* 49 P.3d at 903. To qualify under the "receiver of contributions" prong, an organization must have taken some affirmative step to give its contributors "actual or constructive knowledge that the organization is setting aside funds to support or oppose a candidate or ballot proposition." *Id.* at 904-05.[4] Finally, many of the organizations that technically qualify as "political committees" are exempted from the regular reporting requirements and need only file the initial

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[4] HLW argues that Washington must go further and limit PAC-status to organizations whose *single* major purpose is campaign advocacy (Mot. 10 (Dkt. No. 67)) or who have received contributions that are *explicitly earmarked* for political advocacy (*Id.* at 18.) The Court addresses, and rejects, these arguments in sections II.C.1(d) and II.C.1(e), respectively.

registration. (Rippie. Decl. ¶ 26 (Dkt. No. 47 at 14).) The full reporting requirements are limited to those committees that expect to raise or spend more than $5000 or receive more than $500 from a single contributor. (*Id.*) By imposing the more burdensome reporting requirements—which are still "not particularly onerous," *ARTLC,* 441 F.3d at 791—only on the most active political committees, the state avoids unduly burdening the smaller or less active organizations that might be more likely to self-censor their speech rather than comply with the state's requirements.

[*12][**20] Having determined that Washington's PAC-style requirements impose only relatively minor burdens and focus those burdens on the political committees most able and willing to comply, the Court must consider whether these burdens are justified by compelling state interests. In *Buckley,* the Supreme Court identified three compelling rationales for requiring disclosure of "campaign speech" in candidate elections. "First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate, in order to aid voters in evaluating those who seek federal office." 424 U.S. at 66-67 (internal quotation omitted). "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. "Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of . . . contribution limitations . . . ." *Id.* at 67-68. In *ARTLC,* the Ninth Circuit cited these same three interests in upholding Alaska's PAC-style requirements. *See* 441 F.3d at 792 (holding that Alaska's minor registration and reporting burdens

were narrowly tailored to the state's interest in " 'providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.' " (*quoting McConnell,* 540 U.S. at 196)).

In *CPLC I,* the Ninth Circuit noted that *Buckley* 's second and third rationales generally do not apply in ballot initiative elections, where there is little threat of corruption and typically no limit on contributions or expenditures. 328 F.3d at 1105 n. 23 (9th Cir.2003). However, the Court held that the first "informational" interest "appl[ies] just as forcefully, if not more so, for voter-decided ballot measures." *Id.* at 1105. The Court explained:

> "Even more than candidate elections, initiative campaigns have become a money game, where average citizens are subjected to advertising blitzes of distortion and half-truths and are left to figure out for themselves which interest groups pose the greatest threat to their self-interest." David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* at 18 [**21] (2000). Knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation.
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> ....

> Voters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure's defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation. [The voters], as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyists' services and how much.

[*13] *Id.* at 1105-06. The state's interest in informing the electorate about "where political campaign money comes from and how it is spent," *Buckley,* 424 U.S. at 66 (internal quotation omitted), is only amplified in the ballot initiative context as more and more money is poured into ballot measures nationwide. *See CPLC II,* 328 F.3d at 1105; cf. *Lisa Leff, California Gay Marriage Ban a $73 Million Race,* THE MERCURY NEWS, Nov. 3, 2008, *available at* http://www.mercurynews.com/news/ci_10889066 (noting that California's Proposition 8 was "the costliest election this year outside the race for the White House"). The state therefore retains an extremely compelling interest in "following the money" in ballot initiative elections so that the electorate's decision may be an informed one.

Defendants also raise a compelling interest in protecting the *contributors* of funds used to advocate in support of or in opposition to a ballot initiative. (Rippie Decl. ¶ 29 (Dkt. No. 47 at 16).) Those contributors are entitled to verify that their funds were actually used for their intended purpose. (*See id.* (describing a "high profile enforcement case ... where the public's contributions to the ballot measure committee were unlawfully used by an officer for his personal expenses for activi-

ties unrelated to the campaign, and those facts had been concealed from the public by the treasurer and the committee").) In this respect, the requirements that Washington imposes on "political committees" serve the same goals as the registration and disclosure requirements that most states impose on charities. (*Id.*) The Supreme Court has "repeatedly recognized the legitimacy of government efforts to enable donors to make [**22] informed choices about their charitable contributions." *Illinois v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 623, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003). The Court has also suggested that reporting and disclosure provisions are among the "more benign and narrowly tailored options" available to address these concerns. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 800, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *see also Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (suggesting that "disclosure of the finances of charitable organizations" could prevent fraud "by informing the public of the ways in which their contributions will be employed"). "In accord with [these cases], ... in almost all of the states and many localities, charities and professional fundraisers must register and file regular reports on activities, particularly fundraising costs." *See Telemarketing Assocs.*, 528 U.S. at 623 (internal quotation omitted) (noting that "[t]hese reports are generally available to the public"). The state's interest in preventing fraudulent misuse of contributed funds appears just as compelling when applied to an organization like HLW as when applied to the charitable organizations discussed in *Telemarketing Associates*.

[*14] The Court holds that these two compelling

interests—informing the public about the source of political expenditures and protecting contributors from fraudulent misuse of donations—more than justify the general imposition of PAC-style reporting and disclosure requirements on organizations engaged in ballot measure advocacy. However, the Court must still address several aspects of Washington's specific framework that HLW argues are vague or overbroad.

(c) "in support of, or opposition to"

Under Washington's statute, an organization becomes a "political committee" if it expects to receive contributions or make expenditures "in support of, or opposition to, any candidate or any ballot proposition." WASH. REV.CODE. § 42.17.020(39). HLW first argues that the "political committee" definition is unconstitutionally vague because the words "support" and "opposition" are so indefinite that they do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of* [**23] *Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). HLW also argues that the provision is unconstitutionally broad because it could be read to include expenditures that do not "expressly" advocate for a ballot initiative, but instead merely advocate as to an underlying "issue." (Mot. 11-17 (Dkt. No. 67).)

As to the ambiguity of the words themselves, there are several features of Washington's framework that partially alleviate any vagueness concerns. First, in addressing this sort of vagueness argument, "[c]lose examination of the specificity of the statutory limitation is required where ... the legislation imposes *criminal* penalties." *Buckley,* 424 U.S. at 40-41 (emphasis added). HLW concedes that, unlike the federal statute

at issue in *Buckley,* Washington's PAC-style requirements do *not* carry criminal penalties. (Mot. 12 n. 2 (Dkt. No. 67).) Second, Washington provides various ways to obtain advice or guidance from the PDC: one can call a toll-free phone number, request an informal advisory opinion, request a formal declaratory order, WASH. ADMIN. CODE § 390-12-250, request an interpretative statement, WASH. REV.CODE § 34.05.230 (1), or petition for formal rulemaking, WASH. ADMIN. CODE § 390-12-255. (Rippie Decl. ¶ 21-22 (Dkt. No. 47 at 11-12).) In *Buckley,* the Court suggested that the wide availability of advisory opinions would alleviate many vagueness problems; however, it did not apply in that case "because the vast majority of individuals and groups subject to [the] criminal sanctions ... do not have a right to obtain an advisory opinion from the [FEC]." 424 U.S. at 40 n. 47. In contrast, Washington's framework appears to provide ample opportunity to obtain a pre-enforcement interpretation from the PDC.

Furthermore, HLW's vagueness argument would fail even without these considerations because the Supreme Court has explicitly held that the words "support" and "oppose" are not unconstitutionally vague. In *McConnell,* the Court considered certain limitations on contributions and expenditures for "public communications" that " 'refer[ ] to a clearly identified candidate for Federal office' and 'promote[ ],' 'support[ ],' 'attack[ ],' or 'oppose[ ]' a [**24] candidate for that office." 540 U.S. at 162. The Court rejected an argument that these limitations were unconstitutionally vague, holding:

> [*15] The words "promote," "oppose," "attack," and "support" clearly set forth the confines within which potential party speakers must

> act in order to avoid triggering the provision. These words "provide explicit standards for those who apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."

Id. at 170 n. 64 (*quoting Grayned*, 408 U.S. at 108-09); *see also id.* at 184-85 (rejecting the same vagueness argument for a provision that did not involve party speakers). In light of *McConnell*, this Court holds that the mere use of the terms "support" and "opposition" does not render Washington's definition of "political committee" unconstitutionally vague. *See United States v. Williams*, --- U.S. ----, ----, 128 S.Ct. 1830, 1845, 170 L.Ed.2d 650 (2008) ("[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." (internal quotation omitted)).

HLW's overbreadth argument, however, raises a closer question and requires more extensive analysis. Essentially, Plaintiff argues that "issue advocacy"—political speech that does not expressly advocate the election or defeat of a candidate or ballot initiative—can never be regulated under the First Amendment. (Mot. 14 (Dkt. No. 67).) Under this theory, Washington's definition of "political committee" is unconstitutional because it could be read to include expenditures for communications that do not *expressly* support or oppose the ballot initiative in question.

The distinction between "express advocacy" and "issue advocacy" was first established in *Buckley*. In that case, the Court considered the constitutionality of the Federal Election Campaign Act of 1971 (FECA). *Buckley*, 424 U.S. at 6. In particular, the Court examined provisions that (1) limited individual *contributions*

to $1000 for any single candidate per election; (2) limited individual or group *expenditures* "relative to a clearly identified candidate" to $1000 per year; and (3) required *disclosure* and reporting of contributions and expenditures above certain threshold levels. *Id.* at 7. The Court upheld the contribution limits, [**25] finding they had only a "limited effect upon First Amendment freedoms" and that these effects were justified by "weighty interests." 424 U.S. at 29. The expenditure ceiling, however, "impose[d] significantly more severe restrictions on protected freedoms," operating as an outright prohibition of speech subject to criminal penalties. *Id.* at 19-20, 23. The Court initially interpreted the indefinite phrase "relative to a candidate" to mean "advocating the election or defeat of a candidate," *id.* at 42 (internal quotation marks omitted); however, this narrowed definition still raised First Amendment concerns. "Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* The only way to determine whether public discussion of these issues advocated for or against the candidate would be to measure either the subjective intent of the speaker or the predicted effect on the listener. *Id.* at 43. Because neither intent nor effect can be measured with any certainty, the expenditure limits could chill speech on a huge range of issues. *Id.* Therefore, to avoid vagueness and overbreadth concerns, the Court further narrowed the definition of "expenditure" to cover only "communications that in *express terms* advocate the election or defeat of a clearly defined candidate." *Id.* at 44 (emphasis added). So narrowed, the Court found the expenditure limits utterly ineffective, since groups and individuals could still advocate for or against a candidate so long as they "eschew[ed]

expenditures that [did so] in express terms." *Id.* at 45 ("The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness ...."). Because the expenditure ceiling did not effectively further the state's interest, it did not survive strict scrutiny. *Id.* at 50. Finally, in order to avoid similar overbreadth concerns, the Court applied this same narrow definition of "expenditure" to the FECA's disclosure requirements, which it upheld. *Id.* at 80.

[*16] Since *Buckley,* the distinction between "express advocacy" and "issue advocacy" has proved problematic. In *McConnell,* the Supreme Court considered a challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA), which was passed in part to address the proliferation [**26] of "campaign advertising masquerading as issue ads." 540 U.S. at 132 (internal quotation omitted). To address this problem, the BCRA defined an "electioneering communication" as any "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate;" is made within a certain period of time before an election, primary, or convention; and, for regional candidates, is "targeted to the relevant electorate." *Id.* at 189-90. The statute required disclosure of "electioneering communications" and also prohibited corporations and labor unions from financing such communications through their treasury funds. *Id.* at 190. The challengers noted that this definition went far beyond the "express advocacy" approved in *Buckley* and argued that the BCRA's provisions therefore constituted impermissible regulation of issue advocacy. *Id.* The Court rejected the notion that *"Buckley* drew a constitutionally mandated line between express advocacy

and so-called issue advocacy," instead characterizing the *Buckley* holding as a matter of statutory, rather than constitutional, interpretation. *Id.* at 190. The Court upheld the disclosure requirements, noting that they "do not prevent anyone from speaking" and serve "an important function in informing the public about various candidates' supporters *before* election day." *Id.* at 201 (emphasis in original) (internal quotation omitted). The Court also upheld the prohibition for corporations and unions, holding that the justifications for restricting such speech extended at least to all speech that was the "functional equivalent of express advocacy," which included for the "vast majority" of issue ads. *Id.* at 206.

Four years later, however, the Supreme Court considered an as-applied challenge to the same BCRA prohibition on corporate and union speech that it had facially upheld in *McConnell*. *WRTL*, 127 S.Ct. at 2659. In the Court's primary opinion, Chief Justice Roberts, joined by Justice Alito, noted that *McConnell* had only explicitly upheld the prohibition for communications that were the "functional equivalent of express advocacy." *Id.* Whereas the Court in *McConnell* appeared to take a broad view of this term, *see McConnell*, 540 U.S. at 126 ("While the distinction between 'issue' and express advocacy seemed neat in theory, the [**27] two categories of advertisements proved *functionally identical* in important respects." (emphasis added)); *id.* at 206 (finding that the "vast majority" of issue ads had an "electioneering purpose" and hence were the functional equivalent of express advocacy), the Chief Justice read the term far more narrowly. Expressing the same overbreadth concerns that had troubled the Court in *Buckley*, he held that

"an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL,* 127 S.Ct. at 2667. He found that the interests that justified the regulation of campaign speech did not, in that case, justify the regulation of all genuine issue advertising. *Id.* at 2673.

[*17] Although *WRTL* suggests a renewed concern for the chilling effect of campaign finance laws on the discussion of public issues, the breadth of its holding remains unclear. *McConnell* limited the definition of "electioneering communication" to the "functional equivalent of express advocacy" only as far as it applied to the *prohibition* on corporate and union speech, 540 U.S. at 206, and apparently not as it applied to the BCRA's *disclosure* requirements, *see id.* at 201 (stating, without reservation, that the BCRA's "disclosure requirements are constitutional"). Because *WRTL* 's as-applied challenge was limited to the BCRA's corporate speech prohibition, it is unclear whether the opinion's logic extends to lesser burdens on non-express advocacy.

More importantly, nothing in *Buckley, McConnell,* or *WRTL* suggests that "issue advocacy" is *fundamentally* entitled to greater First Amendment protection than express political advocacy. Indeed, in *Buckley,* the Court repeatedly emphasized that that the protection of campaign speech was at the core of the First Amendment and it merited the same protection as any speech regarding issues of public concern. 424 U.S. at 15 ("[I]t can hardly be doubted that the [First Amendment] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for public office." (internal quotation omitted)); *id.* at 48 ("Advocacy of

the election or defeat of candidates ... is no less entitled to protection under the First [**28] Amendment than the discussion of political policy ...."). The Supreme Court has protected "issue advocacy" from the federal campaign finance laws not because that speech is sacred, but simply because the rationales proffered for those laws have not justified imposing broad burdens on public discourse. *See WRTL,* 127 S.Ct. at 2673 (finding the BCRA's prohibition on corporate speech unconstitutional as applied because "appellants identify no interest sufficiently compelling to justify burdening WRTL's speech").

Buckley, McConnell, and *WRTL* each dealt with federal campaign finance laws that were limited to the election of *candidates,* but *ballot initiative* elections present strikingly different considerations. Indeed, the entire concept of "issue advocacy" takes on a different meaning in ballot measure elections. In candidate elections, "campaign speech" and "issue advocacy" are often difficult to distinguish in practice, but they are at least distinct in theory. *McConnell,* 540 U.S. at 126. In that context, campaign speech is intended to influence the listener to vote for or against a candidate, whereas issue advocacy is intended simply to influence the voter's opinion on an issue of public concern. The problem, of course, is that the speaker's "intent" is impossible to determine, so pure issue advocacy on any number of issues might be mistaken for campaign speech. *Buckley,* 424 U.S. at 42. Any speaker stating a position on an issue that happens to coincide with a candidate's position could be deemed to be "supporting" the candidate; similarly, any disagreement with a candidate's position could be misinterpreted as "opposition" to the candidate. Therefore, broad regulation of campaign speech in a candidate election could

potentially chill vast amounts of issue advocacy on a wide range of public issues—indeed, *any* issue on which *any* candidate has taken a position.

[*18] In the ballot initiative context, however, there is little, if any, meaningful distinction between issue and express advocacy. Ballot initiatives present a single *issue* for public referendum. *See First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 790, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("Referenda are held on *issues* ...." (emphasis added)). "Campaign speech," in this context, is speech intended to influence the voter's opinion as to the merits of this single issue—in other words, it [**29] is "issue advocacy," plain and simple. When an issue is presented to the public for referendum in this manner, the legitimate state interest in determining and reporting "where [the] money comes from," *Buckley,* 424 U.S. at 66 (internal quotation omitted), extends to all public debate on that issue. For example, I-1000 asks voters to decide *a single, specific issue*—namely, whether Washington should allow physician-assisted suicide. In the lead up to the election, voters are entitled to know who is lobbying to influence their opinion on that issue, and whether the speaker has a vested interest in the outcome of ballot initiative.[5] Similarly, when HLW telephones pro-life

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[5] Ballot initiatives also often concern proposed public works projects, where some private parties are almost certain to have a financial stake in the outcome. For example, consider any of the several ballot initiatives concerning the construction of a citywide monorail in Seattle-several parties (construction firms, owners of homes on the proposed line, etc.) have a financial interest in the outcome of such an election. The voters' compelling interest in "knowing who is

households with "an urgent update" informing them of I-1000 and "pleading for [their] help" "at this critical time to get the truth out" about physician-assisted suicide, contributors have an interest in ensuring that HLW actually spends the donated funds on the intended advocacy, whether that advocacy "expressly" mentions I-1000 or not. In short, from the perspective of the state's compelling interests, there is simply no difference between speech that advocates for or against physician-assisted suicide and speech that advocates for or against I-1000.

Regulation of ballot initiative campaign speech, defined broadly, will therefore necessarily impose a burden on "issue advocacy"; however, it is a much more targeted and limited burden than that which troubled the Court in *Buckley* and *WRTL*. Broad, ambiguous regulation of campaign speech in a candidate election risks burdening issue advocacy that is only peripherally related to the election. Moreover, it threatens to burden debate on a *broad* [**30] *range* of issues-indeed, any issue that is arguably "pertinent" to the election. *See WRTL,* 127 S.Ct. at 2669. In contrast, regulating campaign speech in a ballot measure election will burden issue advocacy only as to the *single* issue put

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lobbying for their vote," *CPLC I,* 328 F.3d at 1106, clearly justifies regulating an organization that publicly advocates passing the initiative, but it likewise justifies regulating an organization advocating for the "general" idea that Seattle should have a citywide monorail. The latter issue is fundamental to the ultimate question being put before the voters and implicates the same governmental interest in tracking and disclosing the sources of public expenditures.

before the public, and only because such campaign speech and issue advocacy are, both in practice and in theory, one and the same. In that scenario, the disclosure of issue advocacy is not an unfortunate byproduct of the campaign disclosure laws; it is its central and intended purpose.

Accordingly, the Court rejects HLW's contention that there is a bright-line rule prohibiting the regulation of "issue advocacy" and holds that the state's compelling interests in informing the electorate and protecting contributors justify requiring "political committees" to report on and disclose all expenditures made "in support of, or opposition to ... a ballot proposition." This holds even when "expenditure" is defined to include some advocacy as to the "issue" underlying the proposition, as long as such regulations are limited to the specific issue on which the public's vote is being sought.

(d) "one of its primary purposes"

[*19] HLW also argues that the state's definition of "political committee" is overbroad because the "maker of expenditures" prong applies to any organization that has as "its 'primary *or one of the primary purposes* to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions.' " *EFF,* 49 P.3d at 903 (emphasis added) (*quoting State v. Dan Evans Campaign Comm.,* 509 P.2d 75, 79 (Wash.1976)). HLW claims that the State can only impose "PAC-style" reporting and disclosure requirements on organizations whose *single* "major purpose" is the election or defeat of candidates or ballot initiatives.

In *Buckley,* the Supreme Court considered the

FECA's disclosure requirements as they applied to both "political committees" (who had to "register with the [FEC] and to keep detailed records of both contributions and expenditures") and individuals (who had to disclose contributions or expenditures of over $100 per year, excluding contributions to a candidate or [**31] political committee). 424 U.S. at 63-64. The Court raised the same overbreadth concerns that had led it to strike down the FECA's expenditure ceilings, noting that the requirements for "political committees" "could raise similar vagueness problems" because the term "could be interpreted to reach groups engaged purely in issue advocacy." *Id.* at 79. However, the Court noted that several lower courts had construed the FECA "to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates." *United States v. Nat'l Comm. for Impeachment,* 469 F.2d 1135, 1141 (2d Cir.1972). The Supreme Court adopted this narrowing construction, noting that "[t]o fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley,* 424 U.S. at 79. The Court found that the definition, so narrowed, no longer raised overbreadth concerns; however, it never suggested that this was the *only* legitimate narrowing construction that it could have adopted.

Subsequent Supreme Court opinions make clear that there is no "bright line" requirement that PAC-style requirements only be imposed on organizations whose single "major purpose" is campaign advocacy. One line of cases involved a provision in the

FECA that prohibited *any* corporation "from using treasury funds to make an expenditure 'in connection with' any federal election . . . . " *MCFL,* 479 U.S. at 241. To make political expenditures under the statute, a corporation needed to "administer[ ] a segregated political fund," "appoint a treasurer for its segregated fund, keep records for all contributions, file a statement of organization containing information about the fund, and update that statement periodically," *Austin v. Mich. Chamber of Commerce,* 494 U.S. 652, 657, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)-in other words, the FECA essentially imposed "PAC-style" requirements on *all* corporations, regardless of their major purposes. In *MCFL,* the Supreme Court considered an as-applied challenge to this provision by a small, nonprofit, ideological corporation, 479 U.S. at 241-42, and noted that the corporation faced "more extensive requirements and more stringent restrictions than it [**32] would be if it were not incorporated." *Id.* at 254. The Court suggested that there generally were compelling state interests in regulating the campaign speech of corporations, who received artificial, state-created advantages and whose ability to amass large sums of wealth might lead to an unfair advantage in the political marketplace. *Id.* at 257. However, the Court found that those interests did not apply in this narrow case because MCFL (1) "was formed for the express purpose of promoting political ideas and cannot engage in business activities," (2) "ha[d] no shareholders or other persons affiliated so as to have a claim on its assets or earnings," and (3) "was not established by a business corporation or a labor union, and . . . [had a] policy not to accept contributions from such entities." *Id.* at 264 (noting that these "three features [are] essential to our holding"). Later, in *Austin,* the Court

reiterated that the *MCFL* exception was narrow and applied only to corporations that "share[ ] these crucial features." 494 U.S. at 662. *Austin* makes perfectly clear that PAC-style requirements (extremely similar to those at issue in this case) may be imposed on non-*MCFL*-like corporations who partake in campaign activity even if it is not their single "major purpose." *See id.*[6]

[*20] The Ninth Circuit has upheld the imposition of PAC-style requirements without regard to a corporation's "major purpose," even when that corporation fits within *MCFL* 's narrow exception. In *ARTLC,* the Court considered an Alaska campaign law that required *MCFL*-type corporations to register and file regular reports with the state's election commission. 441 F.3d at 789-91. The Court upheld these PAC-style requirements, noting that they were "not particularly onerous" and justified by the standard interests in disclosure that the Supreme Court recognized in *Buckley* and *McConnell. Id.* at 791-92.[7]

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[6] HLW does not claim to fit within the exception set forth in *MCFL.* HLW appears to satisfy the first two elements of the test (*see* Compl. ¶ 13 (Dkt. No. 1) ("HLW is a nonstock, ideological ... corporation ...."); however, the record does not indicate whether HLW "accepts contributions from" "business corporation[s] or labor union[s]," *see MCFL,* 479 U.S. at 264.

[7] HLW suggests that *ARTLC* was incorrectly decided. (*See* Mot. 9 (Dkt. No. 67) (arguing that *ARTLC* "ignores *MCFL*'s lengthy discussion of the organizational and conduct burdens of PAC status").) The Court disagrees, but notes that it would, of course, be bound to follow *ARTLC* even if it disagreed with the Ninth

[**33] HLW claims, somewhat disingenuously, that the Ninth Circuit held in *CPLC II* that "PAC status may not be imposed on 'multi-purpose organizations.' " (Mot. 7 (Dkt. No. 67).) In fact, the Court in that case explicitly *rejected* CPLC's argument that "because its major purpose is not campaign advocacy, it was improper for California to 'treat [CPLC] like a PAC.' " 507 F.3d at 1180 n. 11. The Court cited *ARTLC* for the proposition that *"irrespective of the major purpose of an organization,* disclosure requirements may be imposed" and found "CPLC's argument to the contrary . . . unpersuasive." *Id.* (emphasis added).

HLW's only support comes from a nonbinding case from the Fourth Circuit. *N.C. Right to Life, Inc. v. Leake (NCRTL),* 525 F.3d 274 (4th Cir.2008). That case involved North Carolina's campaign finance law, which defined a "political committee" to cover any organization that has *"a* major purpose to support or oppose" a candidate for election. *Id.* at 286 (emphasis added). The majority held that *Buckley* had created a hard-and-fast rule: "an entity must have *'the* major purpose' of supporting or opposing a candidate to be designated a political committee." *Id.* at 288 (emphasis in original). It found the state statute overbroad, because it would regulate too much "protected speech unrelated to elections." *Id.* at 289. The majority also found the statute unconstitutionally vague, because it did not expressly define when a "purpose" became a "major purpose." *Id.* at 290.

This Court respectfully disagrees with the Fourth

Circuit's analysis.

Circuit's analysis. Nothing in *Buckley* or *MCFL* suggests a bright-line requirement that PAC-style requirements be reserved for organizations whose single "major purpose" is election-related; indeed, *Austin* specifically upheld similar requirements on a multi-purpose corporation. 494 U.S. at 662. The phrase *"a* major purpose" is no more vague than *"the* major purpose." *See NCRTL,* 525 F.3d at 328 (Michael, J., dissenting). Moreover, the Washington statute in this case creates only civil penalties, and parties can request prior interpretations from the PDC (Rippie Decl. ¶ 21-22 [**34] (Dkt. No. 47 at 11-12)), so there is little fear that any remaining ambiguity in the test will chill protected speech.

[*21] Finally, there are compelling state justifications for extending PAC-style reporting to multi-purpose organizations. First, *Buckley*'s *"the* major purpose" test "encourages advocacy groups to circumvent the law by *not* creating political action committees and instead to hide their electoral advocacy from view by pulling it into the fold of their larger organizational structure." *NCRTL,* 525 F.3d at 332 (Michael, J., dissenting) (emphasis in original). Second, basing "political committee" status on an organization's single "major purpose" discriminates against small organizations, because advocacy that would constitute a small organization's major purpose might only be considered one of several primary purposes at a larger entity. By considering the *absolute* amount of campaign activity as opposed to the *relative* amount of such activity, the state can fairly treat like political expenditures alike, regardless of their source.

Therefore, the Court holds that Washington's

definition of "political committee" is not rendered overbroad simply by including organizations that make supporting or opposing an election "one of [their] primary purposes." The state has a compelling interest in regulating all such organizations rather than simply those whose *single* major purpose is campaign activity. There are advantages and disadvantages to both approaches, and neither is constitutionally required.

(e) "actual or constructive knowledge"

HLW also challenges the "political committee" definition based on its "receiver of contributions" prong, which it likewise claims is overbroad. (Mot. 18 (Dkt. No. 67).) In *Buckley,* the Supreme Court interpreted the FECA's definition of "contribution" to only include funds that were "earmarked for political purposes." 424 U .S. at 23 n. 24. HLW argues that this limiting construction is constitutionally required, and that Washington's definition is [**35] overbroad because it applies whenever a contributor *knows or reasonably should know* that the funds will be used for political purposes. *EFF,* 49 P.3d at 905.

Nothing suggests that states may only regulate contributions that are expressly made for political purposes. In *Buckley,* the Supreme Court considered regulations that applied to various transfers of funds made "for the purpose of influencing" a federal election or primary. 424 U.S. at 23. The statute did not define this phrase, so the Court relied on its "general understanding of what constitutes a political contribution," which included all funds provided directly or indirectly to a candidate, political party, or campaign committee, and all funds transferred to another person or organization "earmarked for political purposes." *Id.* at 23 n. 24. Viewed in this light, the Court held that the

FECA's definition of "contribution" was not unconstitutionally vague, *see id.* at 23 n. 24, 78; however, it never suggested that states could *only* regulate "earmarked" political contributions.

[*22] In fact, the Ninth Circuit has already rejected HLW's argument. In *CPLC II*, the Court considered California's definition of "contribution," which included any payment made when "the donor *knows or has reason to know* that" the payment will be used to make other political contributions or expenditures. 507 F.3d at 1181 (emphasis in original). CPLC argued that the state could only regulate contributions "expressly made for political purposes," but the Court disagreed. *Id.* at 1183 (internal quotation omitted). The state explained why *Buckley*'s narrow definition was insufficient to further its compelling informational interests: "By simply discouraging donors from earmarking their donations . . ., any multi-purpose group could escape classification as a [political committee] and thereby avoid the duty to disclose its contributors . . . ." *Id.* at 1183 (internal quotation omitted). The Court held that California's definition of contribution was narrowly tailored to support its compelling government interest. *Id.* at 1184.

Likewise, Washington's "receiver of contributions" test does not render its PAC-style requirements overbroad. The state's compelling interest in informing the electorate about the [**36] source of political advocacy easily extends to contributions made with the *knowledge* that the contributed funds will be used for political ends. Moreover, a contributor is only deemed to have "constructive knowledge" of an organization's political intentions if that organization has taken some explicit action to make those intentions clear, such as

(1) soliciting contributions for political advocacy, (2) segregating funds for political purposes, (3) registering as a "political committee" with the PDC, or (4) indicating in the organization's bylaws that it intends to receive political contributions. (Rippie Decl. ¶ 35 (Dkt. No. 47 at 18).) As a result, Washington's treatment of "contributions" is far less vague than that in the FECA, which turned on the hard-to-discern "purpose" of the contribution. *See Buckley,* 424 U.S. at 23 n. 24. Therefore, by limiting its regulations to contributions made with "actual or constructive knowledge that the organization is setting aside funds to support or oppose a candidate or ballot proposition," *EFF,* 49 P.3d at 904, the state has narrowly tailored its PAC-style requirements while avoiding the ambiguities that the Court was concerned with in *Buckley. See CPLC II,* 507 F.3d at 1183 ("The fact that California has more explicitly defined 'contribution' does not weaken its legislation.").

(f) "expectation"

Finally, HLW notes that Washington defines "political committees" based on an "expectation" of receiving contributions or making expenditures, and it argues that the term "expectation" is unconstitutionally vague. (Mot. 17 (Dkt. No. 67) ("Is it a hope?-promise?-understanding?-agreement?-contract?").) The Court agrees that the term is ambiguous and that, without guidance from the state courts, it might be difficult for a person of normal intelligence to know at what point an organization "expected" to receive contributions or make expenditures. However, as has already been made clear, the state courts and agencies have significantly narrowed each of the definition's prongs and, in the process, have stripped the definition of ambiguity.

[*23][**37] As described above, to qualify as a "receiver of contributions," an organization must have taken an affirmative step to give potential contributors "actual or constructive knowledge that the organization is setting aside funds to support or oppose a candidate or ballot proposition." *EFF*, 49 P.3d at 904. After any of the specific triggering actions takes place, the organization can "expect" to receive political contributions because its potential contributors will "know or should know" that their contributions will be used for political activity. (Rippie Decl. ¶ 35 (Dkt. No. 47 at 18-19).)

The definition of "political committee" has been similarly narrowed under the "maker of expenditures" prong by requiring that the organization "have as its primary or one of the primary purposes" to support or oppose ballot propositions. *EFF*, 49 P.3d at 903 (internal quotation omitted). Once the organization has made electoral political activity "one of its primary purposes," there is no doubt that it will "expect" to make expenditures in support of that purpose.

These narrowing interpretations of the definition's two prongs impose "political committee" status only after concrete, discernible criteria have been met. In so narrowing the definition, the state courts and agencies have eliminated any ambiguity initially presented by the term "expectation."

(g) Narrow Tailoring

In sum, the Court finds that Washington's PAC-style disclosure and reporting requirements are narrowly tailored to serve the state's compelling interests. Washington's "political committee" requirements are "not particularly onerous." *ARTLC*, 441 F.3d at 791. When Washington voters are asked to vote on

an issue of public concern, they are entitled to know who is lobbying to influence their opinion on that issue. Similarly, when Washington residents contribute funds to an organization claiming to support or oppose a ballot initiative, those contributors are entitled to verify that their funds were used for their intended purpose. *See Riley*, 487 U.S. at 800 (explaining that compelling disclosure of contributions and [**38] expenditures is one of the "more benign and narrowly tailored" means to ensure that organizations are appropriately using the public's contributions). The State is justified in extending these disclosure and reporting requirements to organizations that make campaign advocacy "their primary or one of their primary purposes" and to organizations that give their contributors "actual or constructive knowledge" that the donated funds will be used for electoral political activity. Finally, by reserving its reporting requirements for the most active political committees (*see* Rippie Decl. ¶ 26 (Dkt. No. 47 at 14)), the state has narrowly tailored the provisions to avoids unduly chilling the speech of smaller or more reticent political advocates.

Democracy depends on "uninhibited, robust, and wide-open" speech, which cannot occur "when organizations hide themselves from the scrutiny of the voting public." *McConnell*, 540 U.S. at 197 (internal quotation omitted). The requirements that Washington imposes on "political committees" enforce the disclosure necessary to maintain a well-functioning political process, and no more. Therefore, the PAC-style requirements survive strict scrutiny.

2. Disclosure Requirements for "Independent Expenditures"

[*24] Any entity, regardless of whether it qualifies as a "political committee" under Washington law, must disclose its "independent expenditures" to the PDC if the value of such expenditures totals more than one hundred dollars or cannot reasonably be estimated. WASH. REV.CODE § 42.17.100(2)-(4). An "independent expenditure" is defined as "any expenditure that is made in support of or in opposition to any candidate or ballot proposition" and is not already required to be disclosed under the rules governing political committees. *Id.* § 42.17.100(1). HLW challenges these disclosure requirements for the same reasons it challenges the PAC-style reporting requirements: it argues that "support" and "opposition" are unconstitutionally vague and that the definition as a whole is overbroad because it is not limited to "express advocacy" as applied in *Buckley*. (Mot. 19-21 (Dkt. No. 67).)

[**39] The Court has already rejected both of these arguments. Moreover, HLW's challenge is particularly unpersuasive when directed at simple disclosure requirements, which are reviewed under "exacting scrutiny." *See Davis v. FEC*, --- U.S. ----, ----, 128 S.Ct. 2759, 2775, 171 L.Ed.2d 737 (2008); *Buckley*, 424 U.S. at 64. The Court finds it evident that requiring disclosure of independent expenditures is "substantially related" to Washington's compelling interests; indeed, simple disclosure is one of the least restrictive means of furthering the state's interests. *See McConnell*, 540 U.S. at 201 (noting that disclosure requirements "do not prevent anyone from speaking" (internal quotation omitted)).

3. Disclosure Requirements for "Political Advertising"

Washington also imposes special requirements on "political advertising," and HLW argues that the state's definition of this term is vague and overbroad. (*See* Mot. 21-22 (Dkt. No. 67).) "Political advertising" is defined to include "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign." WASH. REV.CODE § 42.17.020(38).

First, HLW again claims that the terms "support" and "opposition" are vague and overbroad because they could chill "issue advocacy." (Mot. 21-22 (Dkt. No. 67).) This argument is no more persuasive when applied to the definition of "political advertising" than when applied to the definitions of "political committee" or "independent expenditure."

Second, HLW argues that the phrase "directly or indirectly" is vague and overbroad. (*Id.* at 21.) In *AR TLC*, however, the Ninth Circuit had "little trouble" upholding a statute that contained this same term. 441 F.3d at 782-83. In that case, the Court considered Alaska's definition of "electioneering communication," which resembled the federal definition except that it applied when a communication "directly or indirectly identifies a candidate" whereas the federal definition required that a candidate be "clearly" identified. *Id.* The Court explained:

> [*25][**40] The federal definition specifies no method of identification. The Alaska definition specifies that the method may be direct or

> indirect; however, since the words "direct and indirect" together describe the complete universe of possible methods of identification, the Alaska statute has the actual effect of requiring no specific methods of identification, just like the federal definition.

Id. at 783. As in *ARTLC,* the phrase "direct and indirect" neither expands nor contracts the scope of Washington's definition of "political advertising" —instead, it simply "describe[s] the complete universe of possible" appeals. *Id.* Because the phrase does not change the definition's meaning, it cannot, by itself, render the definition vague or overbroad.

Finally, HLW notes, and the state concedes, that the statute does not define the term "mass communication." (Mot. 22 (Dkt. No. 67); Rippie Decl. ¶ 46 (Dkt. No. 47).) The Court acknowledges that the term contains some ambiguity, but this ambiguity provides insufficient grounds to find the definition of "political advertising" unconstitutional. HLW proposes to solicit fundraising through letters and telephone calls and to issue "radio ads." (Compl. ¶ 22-24 (Dkt. No. 1).) The "political advertising" definition explicitly covers "letters" and "radio and television presentations," so the only relevant question to HLW's as-applied challenge is whether its proposed telemarketing solicitation would be considered "any ... other means of mass communication." WASH. REV. CODE § 42.17.020(38). The Court finds that telemarketing fits squarely within any reasonable definition of "mass communication," especially now that telephones are increasingly used both for fundraising and direct political advertising. *See, e.g.,* Carol Costello, *Robocalls flood phone lines in battleground states,*

CNN, Oct. 23, 2008, *available at* http://www.cnn.com/2008/POLITICS/10/23/robo.calls/. Moreover, HLW cannot bring a facial challenge on overbreadth grounds unless it demonstrates that the ambiguity in the definition will chill "substantial" amounts of protected speech. *See Virginia v. Hicks,* 539 U.S. 113, 119-20, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003). HLW makes no attempt to prove that *any* speakers would self-censor their protected speech out of fear that their method of communication might impermissibly be deemed an "other means of mass communication," much less than such a chilling effect would be "substantial ... relative to the scope of the law's plainly legitimate applications." *Id.* [**41] Accordingly, the Court finds that HLW has failed to carry its "heavy burden" of proving that the potentially ambiguous "mass communication" term renders the definition of "political advertising" overbroad. *See McConnell,* 540 U.S. at 207.

4. "Ratings, Evaluations, Endorsements and Recommendations"

Finally, HLW challenges the treatment of ratings and endorsements under Washington Administrative Code § 390-16-206, which provides:

> [*26] (1) Any person making a measurable expenditure of funds to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition shall report such expenditure including all costs of preparation and distribution in accordance with [Washington Revised Code] chapter 42.17. However, rating, endorsement or recommendation expenditures governed by the following provisions are not reportable: The

> news media exemptions provided in [Washington Revised Code §] 42.17.020(15)(b)(iv) and (21)(c), and [Washington Administrative Code §] 390-16-313(2)(b), and the political advertising exemption in [Washington Administrative Code §] 390-05-290.
>
> (2) A candidate or sponsor of a ballot proposition who, or a political committee which, is the subject of the rating, evaluation, endorsement or recommendation shall not be required to report such expenditure as a contribution unless the candidate, sponsor, committee or an agent thereof advises, counsels or otherwise encourages the person to make the expenditure.

Id. The record makes clear that this provision was not intended to create new reporting requirements, but rather to clarify that certain "ratings, evaluations, endorsements, and recommendations" would *not* need to be disclosed to the PDC or reported as contributions by candidates or initiatives being endorsed. (*See* Rippie Decl. ¶ 50 (Dkt. No. 47 at 26).) In particular, ratings and endorsements made without "a measurable expenditure of funds" or made in the form of a news media item, commentary, editorial, etc., need not be disclosed as expenditures or reported as contributions. (*Id.*)

HLW argues that § 390-16-206 is unconstitutional because it "relies on a vague for/against test" and "regulat[es] a vast swath of protected issue advocacy." (Mot. 22-23 (Dkt. No. 67).) Again, the Court notes that "issue advocacy" is not entitled to absolute protection under the First Amendment and can be regulated if the circumstances so justify. Moreover, the [**42] provision

at issue in this challenge does not create new reporting requirements; instead, it carves out an exception to the existing disclosure requirements in order to preserve the traditional function of the news media and to allow non-journalistic individuals and organizations "to evaluate and rank candidates and ballot measures without reporting so long as they are not paying for advertisements or otherwise spending funds to communicate" the ranking or evaluation. (Rippie Decl. ¶ 50 (Dkt. No. 47).) In carving out this commendable exception, the state employs language no more vague than the "support" and "oppose" language approved by the Supreme Court in *McConnell*. 540 U.S. at 170 n. 64. In sum, the Court holds that § 390-16-206 does not violate the First Amendment; instead, it is a laudable attempt to *protect* traditional First Amendment interests within Washington State's campaign finance framework.

III. CONCLUSION

[*27] For the foregoing reasons, Plaintiff's Motion for a Summary Judgment (Dkt. No. 67) is DENIED.

SO ORDERED.

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Revised Code of Washington § 42.17.020(38)

(38) "Political advertising" includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign.

Revised Code of Washington § 42.17.020(39)

(39) "Political committee" means any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

Revised Code of Washington § 42.17.100(1)

(1) For the purposes of this section and RCW 42.17.550 the term "independent expenditure" means any expenditure that is made in support of or in opposition to any candidate or ballot proposition and is not otherwise required to be reported pursuant to RCW 42.17.060, 42.17.080, or 42.17.090. "Independent expenditure" does not include: An internal political communication primarily limited to the contributors to a political party organization or political action committee, or the officers, management staff, and stockholders of a corporation or similar enterprise, or the members of a labor organization or other membership organization; or the rendering of personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. "Volunteer services," for the purposes of this section, means services or labor for which the individual is not compensated by any person.

Washington Administrative Code § 390-16-206(1)

(1) Any person making a measurable expenditure of funds to communicate a rating, evaluation, endorse-

ment or recommendation for or against a candidate or ballot proposition (other than news, feature, or editorial comment in a regularly scheduled issue of a printed periodical or broadcast media program) shall report such expenditure including all costs of preparation and distribution in accordance with Wash. Rev. Code § 42.17.030 through 42.17.100.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUMAN LIFE OF WASHINGTON, INC., Plaintiff-Appellant,	)	
v.	)	Civil Action No. C08-0590
BRUMSICKLE, et al., Defendants-Appellees.	)	

VERIFIED COMPLAINT

Human Life of Washington, Inc. ("HLW") complains as follows:

Introduction

1. HLW wants to engage in constitutionally-protected "issue advocacy" on the subject of physician-assisted suicide, as it has in the past.

2. "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*") (controlling opinion of Roberts, C.J., joined by Alito, J.).

3. "Issue advocacy" is distinguishable from "campaign speech, or 'express advocacy,'" because it is

"speech about public issues more generally." *Id.* at 2659. This protected "issue advocacy" is also known as "political speech." *Id.* at 2659-60, 2664-66, 2669 n.7, 2671, 2673. "Campaign speech" or "express advocacy" is also known as "electioneering." *Id.* at 2667.

4. Because an effort is under way in 2008 to qualify and pass Washington Initiative Measure No. 1000 ("I-1000"), which would legalize physican-assisted suicide, HLW must either endure unconstitutional burdens under Washington law or be chilled from its protected issue advocacy.

5. This is a challenge to the constitutionality of provisions of Washington's election laws and regulations, focusing especially on Washington's unconstitutional replacement of the United States Supreme Court's **(a)** "express advocacy" test (to determine which expenditures for communications may be regulated) and **(b)** "*the* major purpose" test (to determine whether "political committee" ("PAC") burdens may be imposed on an organization) with Washington's vague and overbroad **(a)** "support . . . or . . . oppos[e]" test and **(b)** "*a* primary purpose" test.

6. The U.S. Supreme Court imposed its express-advocacy and *the*-major-purpose tests both to cure vagueness and to assure that a law's "relation . . . to the purposes of [the election law]" (i.e., to regulate elections), is not "too remote," making the law "*impermissibly broad*." *Buckley*, 424 U.S. at 80 (emphasis added).

7. The Court articulated the cure for this "too remote" problem in the disclosure of expenditures context as the requirement that any restriction be "unambiguously related to the campaign of a particular . . . candidate." *Id.* It implemented this "unambigu-

ously campaign related," *id.* at 81, requirement with the express-advocacy test: "we construe 'expenditure' . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." In binding precedent, the Ninth Circuit has reaffirmed that the express-advocacy test is required for vague and overbroad provisions, such as those at issue here. *See American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985-87(9th Cir. 2004).

8. The Court implemented the unambiguously-campaign-related requirement as to which organizations may be subjected to "political committee" ("PAC") status with its requirement that PAC status may only be imposed on organizations "that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79.

9. As applied to ballot initiative campaigns, this unambiguously-campaign-related, express-advocacy requirement would limit Washington's regulation to communications that expressly advocate the passage or defeat of a clearly identified ballot initiative, and the unambiguously-campaign-related, *the*-major-purpose requirement would limit regulation to organizations with the major purpose of qualifying or passing (or defeating) ballot initiatives. Moreover, in binding precedent, the Ninth Circuit recently decided that PAC-style burdens could not be imposed in this ballot-initiative context. *See California Pro-Life Council v. Randolph*, 507 F.3d 1172 (2007).

10. HLW intends to solicit funds for issue-advocacy radio advertisements that it intends to broadcast concerning the physician-assisted suicide issue. These "genuine issue ads," *WRTL II*, 127 S. Ct. at 2659, 2662,

2668-70 & n.8, 2673, will not be "unambiguously campaign related," *id.*, because they will not expressly advocate for or against I-1000, but they will be about Physician-assisted suicide. However, as set out below, Washington's vague and overbroad laws, *see infra*, burden HLW's planned issue advocacy and put it at risk of being deemed a political committee. Becoming a "required filer" would expose HLW to random "audits and field investigations" under Wash. Rev. Code § 42.17.365 and various costs, fees, and penalties, including, but not limited to: a civil penalty of up to $10,000 per violation, Wash. Rev. Code § 42.17.390(3) (with treble damages for a contribution limit violation); a civil penalty of $10 per day for failure to file required reports, Wash. Rev. Code § 42.17.390(4); a civil penalty equivalent to the amount not reported, where reporting was required, Wash. Rev. Code § 42.17.390(5); the states's costs of investigation and trial, including attorney's fees, Wash. Rev. Code § 42.17.400(5); and judgement, including the state's costs and fees, that may be trebled as punitive damages where there is a civil action and the violation is found intentional. Wash. Rev. Code § 42.17.400(5). On information and belief, the PDC has claimed a penalty multiplier where an entity objected to an order to disclose and sought prompt judicial review. HLW believes that the burdens imposed by Washington's statutes and regulations are unconstitutional and so does not intend to comply with them, but HLW is chilled from doing its planned activity because it reasonably fears enforcement by Defendants.

Jurisdiction and Venue

11. This Court has jurisdiction over this civil action arising under 42 U.S.C. § 1983 and the First and

Fourteenth Amendments of the Constitution of the United States of America and involving challenged laws, enforcement policies, and enforcement responsibilities established and maintained under color of law of the State of Washington. 28 U.S.C. § 1331. The challenged provisions and complaint establish an "actual controversy" within the meaning of 28 U.S.C. § 2201, entitling HLW to a declaratory judgment and supplemental relief under 28 U.S.C. § 2202.

12. Venue is proper because jurisdiction is not founded solely on diversity of citizenship, all defendants reside in this district, and a substantial part of the events giving rise to the claim occurred in this district. 28 U.S.C. § 1391(b). The Seattle Division is proper because all defendants do not reside in the counties listed in CR 5(e) (one criterion for assignment to the Tacoma Division) and the claim arose in King County (where HLW resides) and not the counties listed in CR 5(e) (a second criterion for assignment to the Tacoma Division), so that the Seattle Division is proper. CR 5(e).

Parties

13. Plaintiff HLW is a nonstock, ideological, Washington corporation, recognized by the Internal Revenue Service as a nonprofit organization under 26 U.S.C. § 501(c)(4). HLW is the state affiliate of the National Right to Life Committee, headquartered in Washington, D.C. HLW's office is at 14400 Bel-Red Road, #207, Bellevue, Washington 98007. Its website is at www.humanlife.net. As stated in HLW's Mission Statement, its "mission is to reestablish throughout our culture, the recognition that all beings of human origin are persons endowed with intrinsic dignity and the inalienable right to life from conception to natural

death. To accomplish this restoration, [HLW] use[s] peaceful and lawful means of educating and motivating the human heart." A true and correct copy of the full HLW Mission Statement is attached. *See Exhibit 1.* HLW is neither "under the control of a candidate [n]or [is its] major purpose . . . nominati[ng] or electi[ng] . . . candidate[s]," *Buckley*, 424 U.S. at 79 (major purpose test). HLW is neitner under the control of any ballot initiative committee nor is its major purpose qualifying or passing (or defeating) ballot initiatives. HLW is fully independent of any candidate, political party, or political committee in its planned First Amendment activities.

14. Defendant officers and commissioners (and successors in office) of the Washington State Public Disclosure Commission ("PDC"), are Chair Bill Brumsickle, Vice-Chair Ken Schellberg, Secretary Dave Seabrook, Jane Noland, and Jim Clements. *See* http://www.pdc.wa.gov/home/ About/bio_comm.aspx ("Biographies of Commission Members"; names as listed on PDC's official website)). The PDC commissioners have enforcement authority over violations of Washington's election law scheme. Wash. Rev. Code § 42.17.395 (2007).

15. Defendant Rob McKenna (and any successor in office) is the Washington Attorney General, who has enforcement authority over violations of Washington's election law scheme. Wash. Rev. Code § 42.17.400. *See also* http://www.atg.wa.gov/page.aspx?id=1732 ("Biography of Attorney General Rob McKenna"; name as listed on Attorney General's official website).

16. Defendant Dan Satterberg (and any successor in office) is the Prosecuting Attorney for King County (the County in which HLW is located), with enforcement

authority over violations of Washington's election law scheme. Wash. Rev. Code § 42.17.400.

Facts

17. Physician-assisted suicide is a long-time ideological issue for prolife HLW, which has over the years expended considerable time and resources to educate the public on the issue. HLW intends to continue its public education in 2008 by employing "[i]ssue advocacy," which "conveys information and educates." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*") (Roberts, C.J., joined by Alito, J.; controlling opinion).

18. Physican-assisted suicide has been a long-time public issue in Washington and was especially in public awareness and debate in 1991, when the People considered and defeated a ballot initiative to enact a state constitutional amendment legalizing Physican-assisted suicide. HLW made special efforts to educate the public with Physican-assisted suicide issue advocacy in 1991, while people were unusually focused on, and attentive to arguments about, this perennial public issue.

19. The year 2008 is an especially vital time for HLW to address the physician-assisted suicide issue because people again will be unusually attentive as it swirls to the forefront of public attention. The high-profile nature of physician assisted suicide also helps to give greater visibility to the broad range of prolife issues that HLW advances by speaking about the ethic of life in general, which includes the issues of abortion, infanticide, and euthanasia. By being unable to speak on assisted suicide, HLW is affected not just by the loss of its ability to speak on that issue but also by the loss of ability to speak effectively on other non-ballot issues

that are part of the ethic of life that recognizes, and seeks protection for, the inherent value of all human life from fertilization to natural death. The physician-assisted suicide issue is in people's focus because former Governor Booth Gardner filed the proposed I-1000 with the Secretary of State on January 9, 2008, with qualifying signatures due by July 3, 2008. *See* http://www.secstate.wa.gov/elections/initiatives/people.aspx?y=2008. The full text of I-1000 is available at http://www.secstate.wa.gov/elections/initiatives/text/i1000.pdf. The It's My Decision Committee is pushing the initiative. *See* www.itsmydecision.org (promoting "Washington Death With Dignity Initiative"). *See also* http://www.pdc.wa.gov/servlet/CommitteesServlet) (PDC website showing committee's activity). If the initiative proceeds successfully to qualification, it will be on the November 4, 2008 ballot.

20. There has been litigation over the official ballot title and the ballot measure summary, and on February 29, 2008, the Thurston County Superior Court, in *Coalition Against Assisted Suicide v. State of Washington* (No. 08-00265-6) (Order Granting Petition), revised these to read as follows:

BALLOT TITLE

> Statement of Subject: Initiative Measure No. 1000 concerns allowing certain terminally ill competent adults to obtain lethal prescriptions.
>
> Concise Description: This measure would permit terminally ill, competent, adult Washington residents, who are medically predicted to have six months or less to

live, to request and self-administer lethal medication prescribed by a physician.

Should this measure be enacted into law?
Yes [] No []

BALLOT MEASURE SUMMARY

This measure would permit terminally ill, competent, adult Washington residents medically predicted to die within six months, to request and self-administer lethal medication prescribed by a physician. The measure requires two oral and one written request, two physicians to diagnose the patient and determine the patient is competent, a waiting period, and physician verification of an informed patient decision. Physicians, patients and others acting in good faith compliance would have criminal and civil immunity.

21. Because Physican-assisted suicide is now especially in the public awareness and debate, people will be particularly receptive to arguments about the physican-assisted suicide issue, making 2008 an important time for HLW to advocate concerning prolife issues. Therefore, HLW intends to solicit funds as soon as possible for issue-advocacy radio advertisements that it intends to broadcast as soon as possible concerning the physican-assisted suicide issue.

22. A true and correct copy of an issue-advocacy fundraising letter ("Letter") that HLW intends to mail, email, and post on its website as soon as possible in an effort to solicit a large number of donors who support HLW's issue advocacy is attached. *See Exhibit 2.*

23. A true and correct copy of a telephone fundraising script ("Phone Script") that HLW intends to have a vendor employ in an effort to solicit a large number of donors who support HLW's issue advocacy is attached. *See Exhibit 3.*

24. True and correct copies of the scripts of issue-advocacy radio ads ("Ads") that HLW intends to broadcast as soon as possible are attached. *See Exhibit 4.*

25. HLW intends to do these and substantially-similar fundraising and public communications in support of its Physican-assisted suicide issue advocacy in 2008, although these substantially-similar communications have not been created and so cannot be made a part of the present exhibits. Moreover, it is in the nature of issue advocacy that the need to "convey[] information and educate[]," *WRTL II*, 127 S. Ct. at 2667, varies as public debate on an issue varies, so that it is impossible to predict what future issue-advocacy might be required on Physican-assisted suicide—although it is possible to predict the controllable factor that future issue advocacy will be substantially similar.

26. Until a new physican-assisted suicide ballot initiative was actually filed, on January 9, 2008, it was not possible for HLW to be certain that 2008 would be a special opportunity for issue advocacy due to unusually-focused public attention, and until that date, its physican-assisted suicide issue-advocacy would not have been subject to the challenged state provisions.

27. As may be seen at *Exhibit 2*, the Letter contains no express advocacy, i.e., it does not expressly advocate the passage or defeat of a clearly identified ballot initiative. HLW intends to mail more than 1,000 copies

(a statutory trigger) of the Letter (identical except for addressee changes) in 2008. HLW intends to spend in excess of $100 (a statutory trigger) for the 2008 distribution of its Letter.

28. As may be seen at *Exhibit 3*, the Phone Script contains no express advocacy, i.e., it does not expressly advocate the passage or defeat of a clearly identified ballot initiative. HLW intends to have its telephone fundraising company make numerous phone calls in an effort to raise funds for its issue advocacy. HLW intends to spend in excess of $100 (a statutory trigger) for the 2008 distribution of its Phone Script by paid phone callers.

29. As may be seen at *Exhibit 4*, the Ads contain no express advocacy, i.e., they do not expressly advocate the passage or defeat of a clearly identified ballot initiative. HLW intends to run these Ads in 2008, including within 21 days of the November 2008 election, and to run the Ads and materially similar ads repeatedly in 2008 as funds allow. HLW intends to spend in excess of $1000 (a statutory trigger) to broadcast the Ads in 2008.

30. The expenditures for publicly distributing HLW's issue-advocacy Letter, Phone Script, and Ads will not be "contributions" by reason of coordination as defined by Wash. Rev. Code § 42.17.020(15)(a) and Wash. Admin. Code § 390-05-210.

31. HLW's expenditures for 2007 total at or about $180,000, and HLW expects to have a similar level of expenditures in 2008. HLW's expenditures for distributing its Letter, Phone Script, and Ads will not exceed (nor even be close to) 50% of its expenditures so that expenditures for these activities will not be the major purpose of HLW. In fact, HLW anticipates spending

less than 20% of its annual budget for these adds.

32. While HLW is a membership organization, neither the Letter, the Phone Script, nor the Ads will be "an internal political communication primarily limited to . . . the officers, management staff, and stockholders of a corporation . . . or the members of a . . . membership organization," *see* Wash. Rev. Code § 42.17.100, so as to be exempt from regulation as "independent expenditures."

33. HLW intends to do materially similar fundraising and issue advocacy in future years as issues of concern to HLW become subjects of public debate, which HLW believes is reasonably likely to recur at many points in the future, just as it has in HLW's past experience.

34. HLW reasonably fears that it will be considered a "political committee" by Defendants—although passing or defeating ballot measures is not its major purpose—so that HLW will suffer a burdensome investigation, enforcement, and penalties for not complying with Washington's requirements for political committees. *See* Count 1.

35. HLW reasonably fears that its Letter, Phone Script, and/or Ads will be considered "independent expenditures" by Defendants—despite the lack of express advocacy—so that HLW will suffer an investigation, enforcement, and penalties for not complying with Washington's burdensome requirements for groups engaging in independent expenditures. *See* Count 2.

36. HLW reasonably fears that its Letter, Phone Script, and/or Ads will be considered "political advertising" by Defendants—despite the lack of express advocacy—so that HLW will suffer an investigation,

enforcement, and penalties for not complying with Washington's burdensome requirements for groups engaging in political advertising. *See* Count 3.

37. HLW reasonably fears that its Letter, Phone Script, and/or Ads will be considered as "a rating, evaluation, endorsement, or recommendation for or against . . . a ballot measure" by Defendants—despite the lack of express advocacy—so that HLW will suffer an investigation, enforcement, and penalties for not complying with Washington's burdensome requirements for groups engaging in such communications. *See* Count 4.

38. HLW believes that the challenged provisions herein impose unconstitutional burdens on constitutional rights and so will not comply with them, but because HLW fears investigation, enforcement, and penalties for noncompliance with Washington law, HLW is chilled from doing its intended First Amendment activities and will not do them unless it receives the declaratory and injunctive relief prayed for herein.

39. PDC regulations make no provision for issuing advisory opinions, and attorney general advisory opinions are not available to HLW.

40. HLW's chilled speech, the loss of opportunity to advocate concerning the physician-assisted suicide issue, and the loss of the opportunity to effectively advocate the full range of issues included in the life ethic because of the inability to advocate against physician-assisted suicide are irreparable harms for which HLW has no remedy at law.

Count 1—"Political Committee"

41. HLW realleges and incorporates by reference all of the allegations contained in all of the preceding

paragraphs.

42. HLW challenges Washington's manner of imposing PAC status and burdens, which challenge involves the "political committee" definition and one or both of the following tests: (**a**) Washington's "*a* primary purpose" test, *see*, *State v. Dan Evans Campaign Comm.*, 546 P.2d 75, 79 (Wash. 1976) (en banc), *Evergreen Freedom Found. v. Washington Educ. Ass'n*, 49 P.3d 894, 903 (Wash. App. 2002); and (**b**) Washington's "receiver of contributions" test. *See Evergreen Freedom Found.*, 49 P.3d at 904; 1973 Wash. Att'y Gen. Op. 114.

43. The definition of "political committee," at Wash. Rev. Code § 42.17.020(39), is as follows:

> (39) "Political committee" means any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

44. "Political committees" must file a "Statement of Organization" appointing a treasurer, providing detailed information about the organization's officers, and stating what ballot proposition or candidate the committee supports or opposes. Wash. Rev. Code § 42.17.040. PACs also must file monthly reports of all contributions and expenditures, even those unrelated to any political activity, and during the 5 months leading up to a general election such reports must be made on a weekly basis. Wash. Rev. Code § 42.17.080. All contributions received must be deposited into a designated account, Wash. Rev. Code § 42.17.060, and for every contribution over $100 PACs must report the

contributor's name, occupation, and employers address. Wash. Admin. Code § 390-16-034. PACs are prohibited from accepting anonymous donations that in the aggregate exceed 1% of their yearly contributions or $300. Wash. Rev. Code § 42.17.060 PACs must keep their accounting books up to date within 5 days of any contribution or expenditure and the books must be available for public viewing at specified times. Wash. Rev. Code § 42.17.080(5). For the 8 days preceding an election, books must be current within 1 day and available for viewing by the public from 8:00 a.m. to 8:00 p.m. *Id.* PACs are also subject to random "in depth" audits following elections. Political Committees 2007 Campaign Disclosure Instructions, *at* http://www.pdc.wa. gov/ archive/filerassistance /manuals/pdf/2007/2007.Man. Comm.pdf. These PAC burdens are substantial. The PDC's own manual notes that "[t]reasurers for most political committee[s] . . . will have to devote many hours to keeping exact records and filing accurate, detailed reports of receipts and expenditures." *Id.*

45. Washington's PAC definition is unconstitutional because **(a)** "expectation" is undefined, vague, and overbroad in providing a trigger for when PAC burdens are imposed; **(b)** there is no reasonable (or any) monetary contribution or expenditure trigger, *cf.* 2 U.S.C. § 431(4) (federal "political committee" definition with a $1,000 trigger of either contributions or expenditures), which absence enhances the vagueness and overbreadth; **(c)** "contributions" is vague and overbroad, as used here, and does not follow the U.S. Supreme Court's clarifying interpretation of that term in *Buckley*, 424 U.S. at 23 n.24; **(d)** "expenditures" is vague and overbroad, as used here, and does not follow the U.S. Supreme Court's narrowing constructions of

the related uses of "expenditure" in *Buckley*, *id.* at 44, 80, and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*"); (e) "in support of, or opposition to" is undefined, vague, and overbroad; and (f) the definition lacks the United States Supreme Court's required "the major purpose" test. *See Buckley*, 424 U.S. at 79.

46. Washington's "*a* primary purpose" test, *see, e.g.*, PDC Interpretation 07-02 ("'Primary Purpose' Guidelines") (available at http://www.pdc.wa.gov/archive/guide/pdf/Interp0702.pdf), is vague and overbroad (i.e., it fails the unambiguously-campaign-related and narrow-tailoring requirements) because it does not follow the U.S. Supreme Court's "the major purpose" test.

47. Washington's "receiver of contributions" test is vague and overbroad (i.e., it fails the unambiguously-campaign-related and narrow-tailoring requirements) because it does not follow the U.S. Supreme Court's "the major purpose" test.

48. Because Washington's "political committee" definition and the two tests applying it are vague and overbroad (i.e., they fail the unambiguously-campaign-related and narrow-tailoring requirements), it is impossible for HLW to know whether it would be subject to PAC restrictions for its intended activities, and HLW will be subject to the real possibility of a standardless investigation and prosecution for election law violations, all of which chills its First Amendment rights.

49. The "political committee" definition and the two tests applying it are unconstitutionally vague and overbroad (i.e., they fail the unambiguously-campaign-related and narrow-tailoring requirements) because,

inter alia, their failure to employ the U.S. Supreme Court's express-advocacy and "the major purpose" tests, all in violation of the First and Fourteenth Amendments to the U.S. Constitution.

50. The "political committee" definition and the two tests applying it are therefore unconstitutional facially and as applied to HLW and HLW's intended activities.

Count 2—"Independent Expenditure"

51. HLW realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

52. HLW challenges the constitutionality of the second of Washington's two definitions of "independent expenditure," which is at Wash. Rev. Code § 42.17.100 and has application in the ballot initiative context. It is defined as follows:

> (1) For the purposes of this section and RCW 42.17.550 the term "independent expenditure" means any expenditure that is made *in support of or in opposition to* any candidate or *ballot proposition* and is not otherwise required to be reported pursuant to RCW 42.17.060, 42.17.080, or 42.17.090. "Independent expenditure" does not include: An internal political communication primarily limited to the contributors to a political party organization or political action committee, or the officers, management staff, and stockholders of a corporation or similar enterprise, or the members of a labor organization or other membership organization; or the rendering of personal services of the sort commonly performed by volunteer

> campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. "Volunteer services," for the purposes of this section, means services or labor for which the individual is not compensated by any person. [Wash. Rev. Code § 42.17.100 (emphasis added).]

53. By statute, this definition applies in three situations: (**a**) § 42.17.100 itself requires special reporting (entities must file a report of the activity with PDC and a county elections officer within 5 days and at specified subsequent intervals) of independent expenditures by entities that are not required to report as candidate or political committees and that spend $100 or more for the independent expenditures in an "election campaign"; (**b**) § 42.17.103 requires that "[a]ll persons required to report under . . . 42.17.100 . . . are subject to the special reporting requirements of [§ 42.17.103]" (which requires that entities who spend $1,000 or more to do "political advertising" within 21 days of an election must file a special report within 24 hours); and (**c**) § 42.17.550 requires anyone "other than a party organization" that makes an independent expenditure mailing of 1,000 or more pieces "in a single calendar year" to do special reporting (entities must file a statement of the activity with the designated county election officer within 2 days). In addition, § 42.17.510 and Wash. Admin. Code § 390-18-10 require identification of a sponsor's name and address on printed materials and name on broadcast materials as part of the communication.

54. The independent expenditure definition at

§ 42.17.100 is unconstitutionally vague and overbroad (i.e., it fails the unambiguously-campaign-related and narrow-tailoring requirements) because of its reliance on the support/oppose test instead of the U.S. Supreme Court's express-advocacy test, in violation of the First and Fourteenth Amendments to the U.S. Constitution.

55. The independent expenditure definition at § 42.17.100 is therefore unconstitutional facially and as applied to HLW's intended activities.

Count 3—"Political Advertising"

56. HLW realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

57. HLW challenges the constitutionality of Washington's definition of "political advertising," at Wash. Rev. Code § 42.17.020(37) (emphasis added), which is as follows:

> (37) "Political advertising" includes any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used *for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign.*

58. This definition employs the support/oppose test and introduces three subsets of the vague phrase "supporting or opposing," i.e., (**a**) direct or indirect appeals "for votes"; (**b**) direct or indirect appeals for "financial . . . support or opposition"; and (**c**) direct or indirect appeals for "other support or opposition." "Directly or indirectly" is unconstitutionally vague and

overbroad (i.e., it fails the unambiguously-campaign-related and narrow-tailoring requirements), as is "appealing" and "other support or opposition" (which, whatever else it might mean, cannot mean appeals for votes or contributions). "Mass communication" is undefined, so it is impossible to determine, for example, whether 5, 50, 500, or 5,000 letters would trigger the definition.

59. An entity engaged in "political advertising" is subject to various burdens. *See* Wash. Rev. Code § 42.17.103 (special report if it exceeds $1,000); Wash. Rev. Code § 42.17.510 & Wash. Admin. Code § 390-18-010 (on-communication identification of sponsor).

60. The "political advertising" definition is unconstitutionally vague and overbroad (i.e., it fails the unambiguously-campaign-related and narrow-tailoring requirements) because of its reliance on the support/oppose test instead of the U.S. Supreme Court's express-advocacy test and because it contains other vague and overbroad (i.e., they fail the unambiguously-campaign-related and narrow-tailoring requirements) terms, all in violation of the First and Fourteenth Amendments to the U.S. Constitution.

61. The "political advertising" definition is therefore unconstitutional facially and as applied to HLW's intended activities.

Count 4—"Rating, Evaluation, Endorsement or Recommendation"

62. HLW realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

63. HLW challenges the constitutionality of Washington's reporting requirement, at Wash. Admin. Code

§ 390-16-206, for communications containing "a rating, evaluation, endorsement, or recommendation for or against a candidate or ballot measure," which in relevant part is as follows:

> (1) Any person making a measurable expenditure of funds to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition (other than news, feature, or editorial comment in a regularly scheduled issue of a printed periodical or broadcast media program) shall report such expenditure including all costs of preparation and distribution in accordance with RCW 42.17.030 through 42.17.100.

64. This requirement relies on a vague for/against test, not Washington's usual support/oppose test. It is impossible to determine from the terms used whether PDC intends its for/against test to reach more broadly or more narrowly than Washington's statutory support/oppose test, but the tests cannot be the same because the PDC consciously chose non-statutory terms and because otherwise some communications captured here by the for/against test would be redundant of communications captured by the "political advertising" definition. *See supra.* However, given the absence of any requirement that the communication be a "mass communication" (as "political advertising" requires) and the choice of the exceedingly vague, overbroad (i.e., they fail the unambiguously-campaign-related and narrow-tailoring requirements), and undefined terms "rating," "evaluation," "endorsement," and "recommendation," it is apparent that PDC is regulat-

ing a vast swath of protected issue advocacy. And such ratings, evaluations, endorsements, and recommendations would be subject to compelled disclosure at the "measurable expenditure" level of a single letter to a friend discussing a public official who happens to be a candidate.

65. This provision is unconstitutionally vague and overbroad (i.e., it fails the unambiguously-campaign-related and narrow-tailoring requirements) because of its reliance on the for/against test instead of the U.S. Supreme Court's express-advocacy test and because it contains other vague and overbroad (i.e., they fail the unambiguously-campaign-related and narrow-tailoring requirements) terms, all in violation of the First and Fourteenth Amendments to the U.S. Constitution.

66. This regulation is therefore unconstitutional facially and as applied to HLW's intended activities.

Prayer for Relief

Wherefore, HLW prays for the following relief:

1. a declaratory judgment declaring the challenged provisions, policies, and tests are unconstitutional facially and as applied to HLW and HLW's intended activities, or, alternatively, that they have unambiguous, objective, bright-line, narrowly-tailored meanings that conform to the First and Fourteenth Amendments;

2. a preliminary and permanent injunction enjoining defendants from enforcing the challenged provisions facially and as applied to HLW and HLW's intended activities; 3. costs and attorneys fees pursuant to any applicable statute or authority and especially 42 U.S.C. § 1988; and

4. any other relief this Court in its discretion deems just and appropriate.

[Exhibit 1—HLW Mission Statement]

Human Life Of Washington

Our mission is to reestablish throughout our culture, the recognition that all beings of human origin are persons endowed with intrinsic dignity and the inalienable right to life from conception to natural death. To accomplish this restoration, we use peaceful and lawful means of educating and motivating the human heart.

GOALS

Through educational, legislative, and judicial efforts, we seek reform in our culture's understanding of:

PERSONHOOD

The recognition of a dignified and comprehensive definition of "human person."

A return to the critical assumption that all beings of human origin should be considered "persons," and treated as such.

VIEW OF LIFE

Recognition and promotion of the intangible contributory dimensions of happiness, success, and love by family, social, religious, educational, business, and political communities.

Response to the spurious belief that some human lives have "quality" while others do not; cultural consensus that all human life has intrinsic value and immeasurable worth.

A dignified community response to human suffering; one which views compassion as "suffering with" the other.

FREEDOM AND RIGHTS

A cultural attitude which embraces common responsibility in its pursuit of ethics and freedom.

Legal and cultural respect for the inalienability of rights.

A restoration of fidelity to the objective priority of inalienable rights.

A cultural philosophy which unites individual rights with the common good.

[Exhibit 2--HLW Letter]

[date]

Dear [name],

The assisted suicide issue just won't go away. But neither will we. We are here to argue the prolife side on your behalf. However, as this grisly issue heats up again in 2008, Human Life of Washington needs your help to pay for some radio ads to educate the public.

In 1991, Washington voters rejected a ballot initiative that would have legalized assisted suicide. In fact, that initiative would have approved euthanasia by allowing doctors to actually administer the lethal prescription, not just write it. Despite the defeat at the ballot box, the issue didn't go away. In 2006, Sen. Pat Thibaudeau introduced a bill to legalize assisted suicide. She told a Portland newspaper that she didn't expect success but wanted to spark discussion. The bill failed, but now in 2008 the assisted suicide issue is again on the minds of the people of Washington. Now, while their minds are focused on the issue, is the opportune time to educate them on the dangers of assisted suicide--and on the value of every life.

In an 1852 speech before the Massachusetts Anti-Slavery Society, Wendell Phillips warned the gathered abolitionists that "[e]ternal vigilance is the price of liberty." That same eternal vigilance is required of prolifers. Human Life of Washington is being vigilant. On our website, www.humanlife.net, I published a November 6, 2007 article by Wesley Smith on a new study of assisted suicide care in Portland, Oregon versus palliative care in Seattle, Washington. The study, done by Dr. David Jeffrey, a palliative-care

specialist from Scotland, shows that problems with Oregon's assisted suicide scheme are real.

For example, Dr. Jeffrey discovered that one Oregon hospice program had 28 assisted suicides, of which 23 were assisted by the same doctor. So while most Oregon doctors won't participate, Kevorkian-style advocates do the grisly work.

Dr. Jeffrey also discovered that, contrary to popular perception, people who employ assisted suicide are people who seek control, not people who are suffering. "They are independent and have no interest in receiving palliative or hospice care," he wrote.

And Dr. Jeffrey described a case in which it was not certain that the patient was competent when he took the lethal prescription. In fact, another had a feeding tube installed just for assisted suicide, a practice allowing easy administration to patients unable to act on their own to take the deadly drugs. Such questions about competence fly in the face of the assurances that all is going properly in Oregon's assisted suicide plan—a plan that is neither set up nor funded to detect the predicted and apparent abuses.

The public needs to receive this sort of information as assisted suicide advocates once again offer biased, inaccurate, and rosy depictions of this grisly practice. The public needs to know that the answer is love and care at the end of life, not eliminating patients. And people need to be reminded of the importance of patients always being able to trust that physicians will be care givers, not life takers.

Human Life of Washington is vigilant, but we need funds to broadcast our planned educational ads. Will you help? Please send us $100, $50, $25 or whatever you can afford for this vital cause. Do it today. Vigi-

lance is impotent if no one answers the call.

Your friend for life,

Dan Kennedy

P.S.—Things are not well in Oregon's assisted-suicide scheme. The public needs to know of the problems. And they need to know about the many abuses in the Netherlands, where assisted suicide has proven to be a slippery slope leading to involuntary deaths and active euthanasia. Please help us today to get the truth out once again.

[Exhibit 3—HLW Phone Script]

1st Presentation

Hello, Mr./Mrs. ____, my name is [First & Last Name], a paid caller for MDS calling on behalf of Human Life of Washington. Right now we are trying to reach every pro-life household in Washington with an urgent update. As you've probably heard, former Governor Booth Gardner is trying to get an initiative on the ballot this fall that would legalize physician-assisted suicide in the State of Washington. We fear that many Washingtonians do not know the grisly facts about physician-assisted-suicide and its devastating effect on a culture of life.

We need your help at this critical time to get the truth out. We plan to broadcast radio advertisements bringing awareness to this issue and asking the hard questions that others gloss over. Your donation to help us broadcast these ads would make a real difference. If we sent you a letter in the mail, will you help us with a gift of $100 or even $150?

2nd Presentation

I understand, Mr./Mrs. _____, (repeat objection), and many people are helping with smaller amounts as well because there is so much at stake. We must protect the most vulnerable citizens of our state and we must ensure that patients can trust physicians. Physicians are to be care givers, not life takers. That is why we're pleading for your help. I know it may be a real sacrifice. With this in mind, is their any way you can help with a smaller donation of say $40 or $50 to help us educate the public on this important issue?

3rd Presentation

I completely understand, Mr./Mrs. _____, and I know that your heart is with us so I want to give you an opportunity to help. Is there any way you could help us broadcast these ads with a gift of even $20 or $25?

[Exhibit 4—HLW Ads]

Settled

(radio: 30 seconds; M = male; F = female)

M: Assisted suicide is back in the news!

F: Didn't we settle that issue?

M: We *rejected* a ballot measure.

F: Has anything changed?

M: We know more about the dangers.

F: Such as?

M: A new study said one doctor did 23 of the 28 assisted suicides at an Oregon hospice.

F: Sounds like a Kevorkian!

M: And it said one man seemed rushed into it . . . then took hours to die after the drugs. Wife left . . . couldn't take it . . . so depressed that *she* attempted suicide.

F: All reasons *not* to reconsider the issue.

Narrator: Paid for by Human Life of Washington.

Slippery

(radio: 30 seconds)

F: Don't the Dutch do assisted suicide?

M: *And* euthanasia . . . since the 70s.

F: How's it going?

M: Studies say it's a slippery slope. It's only legal with consent, but people who *can't* consent—like babies—are being killed . . .

F: Babies?!

M: . . . and it's only legal for the terminally ill in unbearable physical pain, but some do it for people who are not terminally ill and just tired of life . . . and some who do dozens of killings do no palliative care.

F: But keeping people comfortable is what doctors *should* do, not kill people!

M: It is slippery!

Narrator: Paid for by Human Life of Washington.

Tolerance

(radio: 30 seconds)

F: Why do disability rights groups oppose assisted suicide?

M: Some people think that persons with disabilities don't have lives worth living . . .

F: Like Nazi docs!

M: . . . and steer them to assisted suicide. But persons with disabilities aren't disabled *persons.* They just have different abilities. *They* value their lives. So should we.

F: The Hemlock Society's founder called them "handicapped *person[s].*"

M: And said we should be "tolerant" of helping them die.

F: *He* should be more tolerant—of persons with disabilities.

Narrator: Paid for by Human Life of Washington.

Trust

(radio: 30 seconds)

F: Whatever happened to the Hippocratic Oath?

M: You mean the part that says "I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect?"

F: Exactly. It was a quantum leap in medicine when you knew that you could always trust your doctor. Before that, who knew whether he'd been hired by a family member to hurry up the inheritance?

M: That trust is the foundation of medicine.

F: Assisted suicide removes it . . . turns doctors into killers. That's dangerous.

Narrator: Paid for by Human Life of Washington.

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SUPREME COURT, U.S.
FILED

NO. 10-686

IN THE SUPREME COURT OF
THE UNITED STATES

Human Life of Washington, Inc.,

Petitioners,

v.

CHAIR BILL BRUMSICKLE ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION

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BRIEF OF THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The appellate opinion is reprinted in the Appendix ("Pet. App.") at 1a and available at 624 F.3d 990 (9th Cir. 2010). The district court opinion, Pet. App. 65a, is unreported but available at No. C08-0590, 2009 WL 62144 (W.D. Wash. Jan. 8, 2009).

STATEMENT

A. Washington's Campaign Finance Disclosure Law

Washington voters enacted Initiative 276 in 1972 and determined "[t]hat the public's right to know of the financing of political campaigns and lobbying . . . far outweighs any right that these matters remain secret and private." Wash. Rev. Code § 42.17.010(10). The "Disclosure Law," Wash. Rev. Code § 42.17, continues to serve this fundamental purpose of allowing the public and voters to follow the money in elections by providing timely information about campaign financing.

1. Definition of Political Committee

Like most states and the federal government, Washington requires committees involved in political campaigns to register and disclose certain contributions and expenditures. *See* Wash. Rev. Code §§ 42.17.040, -.060, -.080, -.090; *see generally* http://www.fec.gov/ (federal laws) and http://disclosure.law.ucla.edu (summary of state laws). Under Washington's statute, a political committee is a

person or organization (other than the candidate) having "the expectation of receiving contributions or making expenditures in support of, or opposition to . . . any ballot proposition." Wash. Rev. Code § 42.17.020(39); *see also* Wash. Rev. Code § 42.17.020(4) (definition of ballot proposition).[1]

Washington courts have recognized that the statute provides two alternative prongs under which an organization may be a political committee. An organization is a political committee when: (1) the organization expects to receive or receives contributions in support of or opposition to any candidate or ballot measure (the "receiver of contributions" prong); or (2) when the organization expects to expend or expends funds in support of or opposition to a candidate (the "expenditures prong"). *Evergreen Freedom Found. v. Washington Educ. Ass'n*, 49 P.3d 894 (Wash. Ct. App. 2002), *review denied*, 66 P.3d 639 (Wash. 2003) ("*EFF*"). *See also Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 166 P.3d 1174 (Wash. 2007), *certiorari denied*, 553 U.S. 1079 (2008) ("*VEC*") (rejecting vagueness challenge to definition of political committee).

With regard to the "making of expenditures" prong, the state supreme court has narrowed this definition by ruling that the organization making expenditures must have as its "*primary or one of its primary purposes* . . . to affect, directly or indirectly,

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[1] The definition of political committee applies to "any person." The term "person" is defined to include "any other organization or group of persons, however organized[.]" Wash. Rev. Code § 42.17.020(36). For purposes of clarity, this brief will discuss application of the definition to "organizations."

governmental decision-making by supporting or opposing candidates or ballot propositions[.]" *State v. (1972) Dan. J. Evans Campaign Comm.*, 546 P.2d 75, 79 (Wash. 1976) (emphasis added). The state court of appeals in *EFF* set out a detailed framework to evaluate the *Evans* court's primary purpose analysis. *EFF*, 49 P.3d at 903. *EFF* rejects a formulaic approach (such as a percentage of expenditures) to determine an organization's primary purpose. Instead, the framework examines the stated goals and mission of the organization and whether electoral political activity was a primary means of achieving the stated goals and mission during the period in question. *EFF*, 409 P.3d at 903. The non-exhaustive list of analytical tools include (1) the content of the stated goals and mission of the organization; (2) whether the organization's actions further its stated goals and mission; (3) whether the stated goals and mission would be substantially achieved by a favorable outcome in an upcoming election; and (4) whether the organization uses means other than electoral political activity to achieve its stated goals and mission. *Id.*

2. Disclosures and Reporting Under Washington Law

A political committee must make certain disclosures. A political committee must file a one-page "statement of organization" with the Washington State Public Disclosure Commission ("PDC"), disclosing the name of the organization, related or affiliated committees or other persons, identification of officers and titles, and identification of a treasurer. Wash. Rev. Code § 42.17.040(2). A political committee must make periodic reports of the contributions it receives and the expenditures it makes relating to its support

or opposition of the ballot measure. [2] Wash. Rev. Code §§ 42.17.065, -.080.

Disclosure requirements apply only during the period that the group acts as a political committee. *EFF*, 49 P.3d at 904. Moreover, these requirements apply only to political committees that raise or spend more than $5,000 in a calendar year or that intend to raise more than $500 from any one contributor. Wash. Admin. Code § 390-16-105(2). Committees spending or raising funds below those amounts have the option of even fewer reporting requirements. Wash. Rev. Code § 42.17.370(8); Wash. Admin. Code §§ 390-16-105 through -125.

The Disclosure Law also requires disclosure of certain "independent expenditures" of $100 or more that support or oppose a ballot measure or candidate. Wash. Rev. Code § 42.17.100. Independent expenditures include certain political advertising, defined as "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for

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[2] The term "contribution" is statutorily defined and includes receipt of anything of value contributed for the purpose of supporting or opposing an election campaign, including a ballot measure. Wash. Rev Code §§ 42.17.020(15) ("contribution") and (18) ("election campaign"). The term "expenditure" is defined at Wash. Rev Code § 42.17.020(22) with reference to "furthering or opposing any election campaign."

financial or other support or opposition in any election campaign." Wash. Rev. Code § 42.17.020(38).[3]

The Disclosure Law requires ease of access to campaign finance information. Wash. Rev. Code § 42.17.367. The PDC website provides information related to laws and rules, filer assistance, manuals, training videos, and free electronic filing software, plus a searchable database of campaign finance information. PDC staff provide assistance to any person regarding reports and filing, and any person can obtain guidance from the PDC through requests for informal advisory opinions, declaratory orders (Wash. Rev. Code § 34.05.240; Wash. Admin. Code § 390-12-250), and PDC interpretations (Wash. Rev. Code § 34.05.230). The public and news media make extensive use of disclosed information.

Violations of Wash. Rev. Code § 42.17 may be pursued through an administrative or trial court action, and may be initiated by the PDC, the state attorney general, local prosecutors, or citizens acting on behalf of the state. Wash. Rev. Code §§ 42.17.395, -.400. Only civil remedies and sanctions are available in such administrative and judicial proceedings. Wash. Rev. Code §§ 42.17.360, -.390, -.400.

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[3] Wash. Admin. Code § 390-16-206, which is the object of Question 4 of the Petition, provides that certain ratings or endorsements do not need to be reported, including some persons who make an expenditure to communicate a rating, evaluation, endorsement or recommendation for or against a candidate or ballot proposition. The exceptions include certain news media exemptions provided in Wash. Rev. Code §§ 42.17.020(15)(b)(iv), (21)(c) and exceptions for specified political advertising.

B. Human Life of Washington Activities In Washington Ballot Measure Campaigns

Human Life of Washington, Inc. ("HLW") incorporated in 1971 "[t]o aid, assist, instruct, educate, counsel, direct and participate in the dissemination of any and all information and material concerned with or involved in the respect and preservation of the value of human life," and "[t]o accomplish the purposes herein set forth . . . may . . . engage in any lawful activity either in its own name or in association with other persons, clubs, associations, corporations or other entity." HLW described its purpose as follows: "Through educational, *legislative*, and judicial efforts, we seek reform in our culture's understanding of personhood, view of life and freedom." (Emphasis added).

At times, HLW has pursued its stated mission by actively opposing ballot measures. In 1992, Washington voters considered and rejected Initiative 119 ("I-119"), which was promoted as a "death with dignity" law. HLW actively opposed I-119 directly and through its registered political committee, Human Life PAC. HLW made direct contributions and expenditures, contributed to other political committees, and filed reports. HLW's newsletters repeatedly called upon readers to "oppose," "defeat," "stop," and "reject" I-119, while calling for volunteers to doorbell and make contributions. When I-119 was defeated, HLW solicited funds using full page advertisements saying it spent "enormous amounts of money" opposing the measure.

This case arose after former Washington State Governor Booth Gardner formed a committee to

support an initiative regarding physician-assisted suicide in 2007. The ballot measure received national media attention from the time it was filed with the Washington State Secretary of State in early 2008. The measure became known as Initiative 1000 ("I-1000"). HLW sought to spend funds to oppose I-1000. It stated its intent to expend funds to "advocate" on the topic of I-1000, calling 2008 a "special opportunity" for HLW because "people are particularly receptive to arguments about the issue." The day I-1000 was filed, HLW released a "Special News Report" titled "Assisted Suicide Initiative Filed" directing actions by readers in three ways: (1) asking them to "encourage others not to sign the initiative," (2) linking them to entities opposing the initiative, including to the website of the Washington Coalition Against Assisted Suicide, and (3) providing links to "important resources to help you defeat this initiative." Contrary to HLW's assertion that it would use only 20 percent of its budget on I-1000, the record showed a significantly higher percentage would be used because HLW proposed expenditures on radio advertisements that ranged up to $50,000.

C. Proceedings In District Court

On April 16, 2008, HLW filed a complaint challenging the constitutionality of three Washington State campaign finance disclosure laws and one PDC rule, seeking both declaratory and injunctive relief. Pet. App. 124-145a. Count 1 challenged Washington's definition of "political committee" for using "a primary purpose" in the expenditures prong. It also alleged the use of the words "expectation" and "in support of, or opposition to" in the definitions of contributions and expenditure were vague or overbroad. Pet. App. 138-

139a. Count 2 challenged the definition of "independent expenditure" as vague and overbroad because it uses the terms "support" and "oppose." Pet. App. 142a. Count 3 challenged the definition of "political advertising" as vague and overbroad because it uses the terms "support" and "oppose," the phrase "directly or indirectly," and the phrase "mass communication." Pet. App. 142-143a. Count 4 challenged a PDC rule, Wash. Admin. Code § 390-16-206, because the rule included the terms "support" and "oppose."

The complaint and evidence submitted to the district court confirmed that HLW sought to spend money to engage in an advertising campaign directed at defeating I-1000 in the months leading up to the November 2008 election. The district court denied HLW's request for a preliminary injunction, denied HLW's motion for summary judgment, and granted summary judgment to the state defendants on all counts. Pet. App. 64-123a.

D. Proceedings in the Ninth Circuit Court Of Appeals

HLW appealed. The court of appeals stayed oral argument until this Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). By its stay order, the court of appeals authorized the parties to file supplemental briefing on any impact *Citizens United* would have on the issues, and both parties submitted additional briefing. Following argument, the court of appeals affirmed the district court. Pet. App. 1-63a.

As a threshold matter, the court of appeals held that the case was not moot, and that HLW met the requirements for standing and ripeness,

notwithstanding the passage of I-1000. Pet. App. 14-18a. Turning to HLW's challenges, the court of appeals held first that "exacting scrutiny" applied to HLW's arguments that the disclosure provisions of the law were unconstitutional. The court of appeals explained that *Buckley v. Valeo*, 424 U.S. 1 (1976), provided a clear endorsement that exacting scrutiny applies to challenges to campaign finance disclosure requirements. Pet. App. 21a. The Court also relied on *John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010) ("*Doe v. Reed*"), and *Citizens United*, which "clarified that a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important government interest." Pet. App. 24a (citing *Doe v. Reed*, 130 S. Ct. at 2828, and *Citizens United*, 130 S. Ct. at 914).

Applying exacting scrutiny, the court of appeals held that the challenged provisions "advance the important and well-recognized governmental interest of providing the voting public with" information relevant to voting. Pet. App. 31a. The state has an even higher interest in informing the electorate about the source of campaign money in the context of ballot measures. *Id.* Additionally, it held that Washington similarly has "sufficiently important" interests in disclosure of campaign finance information, and that the challenged disclosure provisions bore a substantial relationship to those important interests. Pet. App. 39a.

With regard to HLW's challenge to the definition of political committee, the court of appeals concluded that "[t]he Disclosure Law . . . is tailored to reach only those groups with a 'primary' purpose of

political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy." Pet. App. 37a. The court of appeals rejected HLW's argument that *Buckley* should be read to limit disclosure requirements on political committees that have "*the*" major purpose[4] of election activities, ruling that the First Amendment does not categorically prohibit government from imposing disclosure requirements on groups with more than one major purpose. Pet. App. 34-36a (citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*")). The court of appeals explained that "the word 'primary' - not the words 'a' or 'the' - is what is constitutionally significant" because the government's informational interest in disclosure is just as strong (or stronger) for groups with a primary purpose of election advocacy. Pet. App. 37a. Further, it explained that Washington's definition served an important public interest by ensuring that such groups would not circumvent and evade disclosure requirements. Pet. App. 38a.

Next, the court of appeals rejected HLW's argument that the disclosure requirements are unconstitutionally "onerous," again following this

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[4] The phrase from *Buckley* reads: "To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Buckley*, 424 U.S. at 79.

Court's decision in *Citizens United*. Pet. App. 40a. "Like the requirements in *Citizens United*, Washington State's political committee disclosure requirements are not unconstitutionally burdensome relative to the government's informational interest. Rather, they are narrowly tailored such that the required disclosure increases as a political committee more actively engages in campaign spending and as an election nears." Pet. App. 42a. The court of appeals concluded that the Disclosure Law's "somewhat modest political committee disclosure requirements" meet exacting scrutiny because they "are substantially related to the government's interest in informing the electorate[.]" Pet. App. 44a.

The court of appeals then turned to, and rejected, HLW's argument that the Disclosure Law's definitions for "independent expenditure" and "political advertising" are vague or overbroad and lack a substantial relation to important government interests. Pet. App. 44a. HLW's vagueness and overbreadth argument claimed that the statutory definitions would reach issue advocacy, rather than express advocacy. The court of appeals concluded first that the proposed advertisements were the functional equivalent of express advocacy and subject to regulation under this Court's decisions in *McConnell v. FEC*, 540 U.S. 93 (2003) *("McConnell")* and *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (*"WRTL"*). Pet. App. 46-47a. But, even if the communications proposed by HLW were "issue advocacy," the court of appeals ruled that this Court has previously rejected the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of

express advocacy." Pet. App. 47-48a (citing *Citizens United*, 130 S. Ct. at 915).

The court of appeals then held that the requirements imposed on "independent expenditures" and "political advertising" are substantially related to Washington's important informational interests. Pet. App. 49a. "As in *Citizens United*, Washington voters' interest in knowing who is speaking about physician-assisted suicide shortly before they vote on a ballot initiative that proposes to legalize that practice is sufficient to support the Disclosure Law's requirements." Pet. App. 51a. In particular, a ballot measure involves voters acting as legislators where "the government has a vital interest in providing the public with information about who is trying to sway its opinion." Pet. App. 51a. Furthermore, the court of appeals explained that there is less danger of disclosure regulations sweeping too broadly in the context of a ballot measure. Pet. App. 52a. The Disclosure Law "target[s] only those expenditures and advertisements made in conjunction with an ongoing election or vote." Pet. App. 53a. The requirements on groups, like HLW, are related to the existence of a ballot initiative campaign and the date of the election. Pet. App. 53a.

Next, the court of appeals rejected HLW's other vagueness arguments. It rejected HLW's challenge to the word "expectation," which is used in the definition of political committee. Under controlling Washington case law, the standard provides "concrete, discernible criteria necessary to prevent arbitrary and discriminatory enforcement[.]" Pet. App. 58a. Similarly, the court of appeals rejected HLW's objection to the term "mass communication" in the

definition of "political advertising," ruling that the term is clear because it is part of a list of ordinary and well-understood communications. Pet. App. 60a.

Finally, the court of appeals rejected HLW's as-applied challenge to the Disclosure Law, finding that HLW had offered no evidence to support such a challenge. The verified complaint cited by HLW was "devoid of information" to show the Disclosure Law was unconstitutional as applied to HLW. Pet. App. 61a. Moreover, the record did not establish that the complaint had been verified by a person with personal knowledge. Pet. App. 61a.[5] Thus, the only evidence in the record showed that HLW could easily meet the requirements of the law, and that the reporting requirements imposed by the law are "quite modest." Pet. App. 61a.

HLW filed its Petition For A Writ Of Certiorari with this Court on November 22, 2010.

REASONS FOR DENYING THE PETITION

The court of appeals concluded that Washington's disclosure requirements do not limit speech by an organization like HLW, and that the disclosure requirements are tailored to the well-recognized important interests of providing information to voters regarding who is financing the support of and opposition to a ballot measure. In reaching this conclusion, the court of appeals opinion

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[5] The CEO of HLW, who signed the verified complaint, could not, in fact, verify many sections of the complaint. He acknowledged that he did not have personal knowledge of certain factual contentions and that he could not verify the legal contentions.

closely follows this Court's rulings and presents no conflict with any decision of this Court. Nor does it present any genuine or important conflict with a decision by another circuit.

A. The Decision Below Is An Unremarkable Application of This Court's Precedent

HLW makes a number of arguments to claim that the court of appeals decision conflicts with decisions of this Court. As shown in this section, the decision below closely follows the Court's controlling precedent. HLW's claims of conflict are based on inapposite cases, on standards that are not supported by decisions of this Court, and on alleged standards that have been affirmatively rejected by this Court.

1. Consistent With This Court's Decisions, The Circuit Court Ruled That The Challenged Disclosure Requirements Are Subject To Exacting Scrutiny

HLW argues that the court of appeals determination that exacting scrutiny applies to the disclosure requirements in this case conflicts with decisions of this Court. Pet. 26-30. To the contrary, the court of appeals follows the Court's decisions from *Buckley* through *Citizens United* and *Doe v. Reed*, where this Court has held that exacting scrutiny applies to campaign finance disclosure requirements. Pet. App. 25a.

In *Citizens United*, the Court held that exacting scrutiny applies to the disclosure requirements. As the Court explained, "Disclaimer and disclosure requirements may burden the ability to speak, but

they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United*, 130 S. Ct. at 914 (internal quotation marks and citations omitted). The opinion in *Citizens United* demonstrates that the formulation of exacting scrutiny used by the court of appeals, Pet. App. 25a, is well-established. "'[E]xacting scrutiny,' . . . requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (citing *Buckley*, 424 U.S. at 64, 66, and *McConnell*, 543 U.S. at 231-32).

In *Doe v. Reed*, the Court applied exacting scrutiny to Washington's law requiring public disclosure of the names of persons signing referendum petitions. *Doe v. Reed*, 130 S. Ct. at 2818. As in *Citizens United*, the Court distinguished between state laws that prohibit or limit speech and laws that compel disclosure, holding that exacting scrutiny applied because disclosure of the public records was not a "prohibition on speech[.]" *Id.* [6]

HLW's conflict argument is not premised on a claim that the Disclosure Law involves a prohibition on speech. Pet. 29. Instead, HLW seeks to bypass *Citizens United* and *Doe v. Reed* and apply strict scrutiny to Washington's disclosure laws. HLW's argument misreads *Citizens United*, citing to this Court's application of strict scrutiny to the federal law prohibiting corporations from spending money, where the Court rejected the FEC's argument that the

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[6] The public records disclosure provisions at issue in *Doe v. Reed* were enacted as part of the same initiative, I-276, that put in place the Disclosure Law.

corporation had the option to create a political committee. Based on this element of *Citizens United*, HLW claims strict scrutiny applies to disclosure requirements on political committees. Pet. 29.

HLW's argument is an unsound reading of *Citizens United*. While the Court in *Citizens United* addressed the option of creating a separate entity, it concluded that this option did not overcome the fact that federal law prohibited speech by the corporation. *Citizens United*, 130 S. Ct. at 898. The opinion makes it clear that the trigger for strict scrutiny is the prohibition on speech. This is also made obvious when the Court applies exacting scrutiny to examine the disclaimer and disclosure requirements on the same corporations, and explains that disclosure is a "less restrictive alternative to more comprehensive regulations of speech[.]" *Citizens United*, 130 S. Ct. at 915 (citing to *MCFL*, 479 U.S. at 262).

HLW's reliance on *MCFL* suffers from the same flaw as its reading of *Citizens United*. Both *Citizens United* and *MCFL* considered 2 U.S.C. § 441b, a statute prohibiting corporations from spending corporate treasury funds to advocate for or against federal candidates absent forming a separate and segregated fund. *See* 2 U.S.C. § 441b(b)(2), (4); 11 C.F.R. § 114.1 through –.8. As in *Citizens United*, the *MCFL* Court applied strict scrutiny based on the prohibition on corporate expenditures. *MCFL*, 479 U.S. at 252 (plurality opinion) ("corporation is not free to use its general funds for campaign advocacy purposes"). Thus, the court of appeals decision is not in conflict with *Citizens United* or *MCFL* because HLW does not claim (and did not show) that the Disclosure Law prevents it from speaking in its own name or

using its own funds. Indeed, HLW's Petition would simply reargue the Court's recent rulings that exacting scrutiny provides the relevant framework for reviewing disclosure requirements.

Alternatively, HLW argues that the Court has viewed the registration and disclosure for some political committees as "onerous" and contends that exacting scrutiny cannot apply to onerous burdens. Pet. 27. This proposal of a special standard based on the term "onerous" is again contrary to the Court's ruling in *Citizens United* that exacting scrutiny applies to disclosure requirements. *Citizens United*, 130 S. Ct. at 914. HLW can cite no case where this Court uses an "onerousness" standard, instead of exacting scrutiny, to compare disclosure requirements to state interests.[7]

HLW's argument in favor of two tiers of exacting scrutiny for disclosure provisions should likewise be rejected. Pet. 30 (suggesting that there is both "complaisant" and "high" exacting scrutiny). HLW does not show that any court follows its anomalous approach or that there is any confusion related to different tiers of exacting scrutiny. Further, there is nothing in the court of appeals opinion addressing these supposedly different tiers; instead, the formulation by the court of appeals

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[7] As an additional matter, HLW's repeated arguments that the disclosure requirements are onerous are not suitable for certiorari because no evidence supports HLW. As the court of appeals explained, HLW's case mounted only a facial challenge to the disclosure requirements. Pet. App. 60a. Virtually all the evidence in the record was supplied by the state and it showed that the requirements for political committees and independent expenditures are "modest." Pet. App. 44a.

squarely follows this Court's formulation of exacting scrutiny. Pet. App. 24a.

2. Washington's Construction of Political Committee Does Not Conflict With Opinions Of This Court

As discussed above at pp. 2-3, an organization is a "political committee" under the expenditures prong of the Disclosure Law if its "primary or one of the primary purposes" is "to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *EFF*, 49 P.3d at 903 (quoting *Evans*, 546 P.2d at 79). HLW argues that *Buckley* holds that no organization can be required to register and provide disclosure as a political committee unless "*the*" major purpose of the organization is the nomination or election of a candidate. Pet. 16. HLW claims its view of *Buckley* is supported by *MCFL* and *McConnell*. *Id.* The court of appeals decision does not conflict with *Buckley*, *MCFL*, or *McConnell* because those cases do not support HLW's view that the First Amendment categorically prohibits a state from designating an organization as a "political committee" unless the organization's sole major purpose is campaign advocacy. [8]

The Court in *Buckley* used the phrase "the major purpose" to provide a narrowing construction to

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[8] HLW did not challenge below the constitutionality of the state's definition of political committee as it related to the "receiver of contributions" prong. Although HLW mentions this prong for the first time in the Petition at 8-9, it has not supported any challenge to the contributions prong with argument or authority.

the specific statutory definition of "political committee" in the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431, *et seq.* *Buckley*, 42 U.S. at 79-80. As the court of appeals concluded, nothing in *Buckley* suggests that the phrase is an absolute limit on when a state may seek disclosure by an organization involved in support of or opposition to a ballot measure. Pet. App. 34-35a. Instead, as the court of appeals found, Washington satisfies the constitution because its definition "is tailored to reach only those groups with a 'primary' purpose of political activity. This limitation ensures that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy." Pet. App. 37a.

HLW's reliance on *MCFL* to mandate use of "*the*" major purpose is also unsound because that case did not address that issue. *MCFL* dealt with an expenditure limit, which imposed a significantly higher First Amendment burden and, therefore, involved a higher level of scrutiny. Pet. App. 35a. As the court of appeals recognized, the Court in *MCFL* "considered whether the burden of a corporate campaign *expenditure limitation* was unconstitutional as applied to an ideological nonprofit; it did not consider a facial challenge to a disclosure requirement imposed on entities engaging in political advocacy." Pet. App. 35a (citing *MCFL*, 479 U.S. at 241) (emphasis added).[9]

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[9] HLW also argues for a conflict based on the phrase "the major purpose" by citing FEC notices that summarized case law. Pet. 18 (citing 72 Fed. Reg. 5595). Putting aside whether the FEC notices could be the basis to demonstrate a conflict, the notices do not endorse HLW's view that the Constitution requires rigid focus on "*the* major purpose."

HLW also contends that the Disclosure Law's use of the terms "support" and "oppose" are vague and overbroad, and that *Buckley* limits the State to examining only the organization's "expenditures and contributions of a single year" in order to determine an organization's political committee status. Pet. 24-25. HLW's argument is contrary to this Court's holding that the terms "support" or "oppose" are not vague or overbroad. *See, e.g., McConnell*, 540 U.S. at 170 n. 64 (explicitly holding that the terms "support" and "oppose" are not vague). In no case has the Court determined that disclosure laws regarding political committees are invalid by virtue of using the terms "support" or "oppose."

This Court has also never adopted HLW's purported tests for determining whether an organization is a political committee. Nor has any court held that only one particular method is appropriate for making such a determination. As discussed, *Buckley* provides a narrowing construction of a specific federal statute, not a singular approach that must be exported to every state's regulation of every type of political committee. This reading of *Buckley* is confirmed by *MCFL,* where the Court identifies other methods that could be used to ascertain an organization's "major purpose." *MCFL*, 479 U.S. at 252, n. 6 and 262); *see also Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d

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Instead, the FEC notice simply reviews case law and concludes that the "Court's major purpose test from *Buckley* has not been eliminated by federal legislation or case law." 72 Fed. Reg. at 5597 (discussing *McConnell,* 540 U.S. at 203-04). Read in context, the FEC notice falls far short of endorsing HLW's stringent use of "*the*" major purpose.

1137, 1152 (10th Cir. 2007) (*"CRLC"*) (reviewing how *MCFL* provided additional non-exclusive suggested methods).[10]

To claim that Washington's determination of primary purpose is unclear, HLW baldly asserts that Washington law does not provide adequate guidance. Pet. 23. This mischaracterizes the issue raised by this case because it ignores the record, the controlling construction of Washington's definition, and the wealth of guidance available. The record shows that since 1973, Washington's statute defining "political committee" has been interpreted to consider an organization's "primary purposes." *See* Wash. AGO 1973 No. 14, 1973 WL 153939 (Wash. Att'y Gen. June 8, 1973). As discussed previously and also by the court of appeals, state appellate decisions and PDC guidance have implemented primary purpose using objective factors. *See supra* 3-5.[11]

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[10] The state supreme court relied on *McConnell* to reject a challenge to the terms "support" and "oppose" as used in Washington's definition of political committee. *VEC*, 166 P.3d at 1184 (citing *McConnell* and holding that "support" and "oppose" are not unconstitutionally vague).

[11] The Court should also look past HLW's criticism of the court of appeals for citing an HLW email, where HLW argues that Washington does not regulate emails as "expenditures." Pet. 22. This email alone would not make an organization into a political committee under Washington law and that is not suggested by the court of appeals. In context, the court of appeal addresses the email as part of a larger record showing that HLW's primary purpose in 2008 would be to expend funds to oppose I-1000. Pet. App. 3-6a; 60-62a.

3. The Petition's Questions Regarding The Definition Of "Independent Expenditure" and "Political Advertising" Present No Conflict And Do Not Raise Important Questions Requiring Review

HLW's second and third questions presented ask the Court to address the definitions of "independent expenditure" and "political advertising". Pet. (i). The Disclosure Law defines "independent expenditure" in terms of money spent "in support of or opposition to" a candidate or ballot measure. Wash. Rev. Code § 42.17.100. "Political advertising" includes mass communications "used for the purpose of appealing, directly or indirectly" for votes for financial or other "support or opposition" in any election campaign. Wash. Rev. Code § 42.17.020(38). The Petition barely addresses these questions and fails to identify any conflict or important question warranting certiorari. *See* Pet. 32-33.[12]

The court of appeals determined these definitions are not overbroad because they do not burden more speech than is constitutionally

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[12] The Petition includes no analysis to support certiorari on its fourth question concerning Wash. Admin. Code § 390-16-206. As the court of appeals explained, one sentence of this rule uses the phrase "for or against" and HLW argued that it should say "expressly for or against." Pet. App. 55a, n.8. But, as the court of appeals concluded, the rule does not create any disclosure requirements; it simply clarifies that certain communications - such as newspaper editorials and news commentaries - are exempt from certain Disclosure Law's requirements for ratings and endorsements. Pet. App. 55a, n.8. HLW does not explain why review is warranted to address this rule.

permissible under exacting scrutiny. Pet. App 50-55a. It determined the reporting requirements imposed on independent expenditures and political advertising are substantially related to Washington's important informational interests, targeting only those expenditures and political advertising made in conjunction with an election or vote. Pet. App. 53a. Similarly, the court of appeals rejected HLW's vagueness argument with respect to use of the phrase "mass communication" in the political advertising definition. Pet. App. 60a. The court of appeals described that the term has an ordinary, contemporary, common meaning that clearly embraced HLW's proposed political advertising. Pet. App. 60a. Moreover, the court of appeals found there is no reason to believe the phrase "mass communication" would be vague in the vast majority of its intended application. Pet. App. 60a.

To assert a conflict concerning these definitions, HLW cites to *Buckley* and *MCFL*. HLW contends that "operative phrases" in those cases (which include "relative to a clearly identified candidate" and "for the purpose of . . . influencing the nomination of candidates" and "advocating the election or defeat of a candidate") have been found to be vague and overbroad. Pet. 33-34. The court of appeals decision, however, deals with different terms in the Disclosure Law and, thus, no conflict is presented.

The Petition appears to argue that *Buckley* held that disclosure depends on "magic words" of "express advocacy" and disclosure of anything else (including independent expenditures and political advertising that do not contain "magic words") is unconstitutional. Pet. 33. HLW describes *Citizens United* as "extending"

disclosure only to statutes that have a "very bright line" such as the federal electioneering communications definition. Pet. 34. In finding disclosure and disclaimer provisions constitutional, this Court in *Citizens United* unequivocally stated that disclosure requirements are not confined to speech that is the "functional equivalent of express advocacy." *Citizens United*, 130 S. Ct. at 915. Had this Court extended disclosure requirements only to those containing magic words, it would have said so.

The court of appeals, therefore, properly characterized HLW's arguments as those already rejected by this Court in *Citizens United*, and other precedents, concluding that HLW "does no more than reiterate arguments that have been rejected by the Supreme Court." Pet. 48a. For example, in upholding the application of disclosure requirements to electioneering communications, the court of appeals recognized that *McConnell* "rejected the notion that *Buckley* establishes 'a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech'." Pet. App. 48-49a (quoting *McConnell*, 540 U.S. at 190). Similarly, the court of appeals noted that HLW's reading of *WRTL* was rejected in *Citizens United*. Pet. App. 49a. As the court of appeals properly concluded, "imposing disclosure obligations on communicators engaged in issue advocacy is not *per se* unconstitutional; instead, the constitutionality of the obligations is determined by whether they are substantially related to a sufficiently important governmental interest." Pet. App. 49a.

HLW's challenge to the Disclosure Law's definitions of independent expenditure and political advertising, which enable disclosure, presents no conflict with decisions of this Court in order to warrant certiorari.

B. The Decision Below Creates No Circuit Conflict

HLW claims a conflict with the decisions of other circuits with regard to the lower court's application of "exacting scrutiny" and its rejection of HLW's rigid focus on "*the*" major purpose for political committee determination. *See* Pet. 19-21, 31-32. The circuit court cases cited by HLW, however, present no genuine conflict on the level of scrutiny required for disclosure provisions. With regard to evaluation of *Buckley's* "major purpose" analyses, the decisions are unique to the particular state statutes and do not reflect any genuine conflict.

1. HLW principally relies on a Fourth Circuit decision that predates critical decisions of this Court and creates no genuine conflict

HLW relies on the Fourth Circuit's decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) to support its circuit split contention. In *Leake*, a two-judge majority struck down North Carolina's definition of political committee based, in part, on its conclusion that, under *Buckley*, a political committee must be limited to organizations with "*the* major purpose" of electing or defeating a candidate. *Leake*, 525 F.3d at 287. The Fourth Circuit panel read *Buckley* to require that "the burdens of political committee designation

only fall on entities whose primary, or only, activities are within the 'core' of Congress's power to regulate elections." *Id.* at 288. For a number of reasons, the *Leake* decision does not reflect a genuine conflict with the decision below.

As an initial matter, *Leake* pre-dates both *Citizens United* and *Doe v. Reed*. The Fourth Circuit has not had the opportunity to consider this Court's most recent holdings regarding disclosure, and the important governmental and voter interests served thereby. The Ninth Circuit recognized that fact, stating that *Leake* "predates *Citizens United* and *Reed* and therefore is unpersuasive in the disclosure context." Pet. App. 45a, n.5. Further, no conflict is presented because the majority in *Leake* does not analyze the phrase "exacting scrutiny." HLW's claim of conflict on the level of scrutiny relies solely on the dissenting judge's argument that the majority inappropriately relied on strict scrutiny cases. Pet. 31. The Fourth Circuit should be allowed to address the level of scrutiny and apply *Citizens United* and *Doe v. Reed* before this Court concludes that a genuine conflict has developed.

With regard to the precise phrase "*the* major purpose" from *Buckley*, *Leake* presents no conflict because the majority expressly recognized that its conclusion regarding North Carolina's definition would not apply to Washington's definition of political committee. Responding to the dissent, the majority states that the Washington statutes addressed in the dissent's case law contain "none of the infirmities" the panel found in the North Carolina laws. *Leake*, 525 F.3d at 299 (citing to *VEC*). Furthermore, the majority in *Leake* relied on

a finding that North Carolina had not provided "potentially regulated entities with any idea of how to comply with the law." *Leake*, 525 F.3d at 289. This is distinguishable from Washington and the record below, which showed no such difficulties in complying with Washington's definition or its modest disclosure requirements for political committees.

The absence of a genuine or developed conflict between the Fourth and Ninth Circuits is further shown by the Fourth Circuit's rejection of various "bright-line" tests for determining major purpose. Similar to HLW's arguments, Pet. 22-26, the plaintiffs in *Leake* asked the court to hold that an organization could fall within the ambit of *Buckley's* major purpose test only if "(1) the organic documents of the organization list electoral advocacy as the organization's major purpose or (2) if the organization spends over 50% of its money on influencing elections." *Leake*, 525 F.3d at 289, n.6. The Fourth Circuit expressly declined those standards for determining whether an organization's major purpose is the support or opposition of candidates. *Id.* ("[w]e need not determine in this case whether [the plaintiffs' standard] is the only manner in which North Carolina can apply the teachings of *Buckley*").[13]

Finally, prior panels in the Fourth Circuit have not accepted a rigid view of "*the*" major purpose

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[13] HLW asserts that *Leake* also held that the "*only* two regulable communications" are the "*federally* defined" terms of "independent expenditures" and "electioneering communications." Pet. 34 (emphasis added), citing to *Leake* at 525 F.3d at 284. HLW significantly misstates *Leake*, which contains no such sweeping holding.

as did *Leake*. Specifically, in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), the court of appeals determined that *Buckley*'s definition of "political committee" was construed to include only those entities that have as "*a* major purpose" engaging in express advocacy in support of a candidate. *Bartlett*, 168 F.3d at 712.[14] The Ninth Circuit's reading of *Buckley* is thus similar to the Fourth Circuit in *Bartlett*. *See* Pet. App. 32a-33a.

2. The decision below comports with other circuit court opinions

Once *Leake* is addressed, there is no substance to HLW's other claims of conflict between the circuits.

HLW cites the Tenth Circuit's ruling in *CRLC*, *supra* at p. 20, to claim a conflict regarding exacting scrutiny. Pet. 31-32. But first, the *CRLC* decision is a pre-*Citizens United* and *Doe v. Reed* decision and thus presents no conflict. Second, the Tenth Circuit in *CRLC* applied strict scrutiny to a provision similar to that at issue in *MCFL*, whereby corporations were banned from making electioneering expenditures. *CRLC*, 498 F.3d at 1141, 1146. HLW's complaint does not involve such restrictions. Third, the Tenth Circuit has applied exacting scrutiny in a more recent case challenging disclosure requirements, which dispels HLW's claim that the Tenth Circuit would apply strict scrutiny in a challenge to

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[14] In the Petition, HLW cites *Bartlett* as standing for *the* "major purpose". Pet. 20. The quotation provided in the Petition obscures the fact that *Bartlett* used the word "*a*" before "major purpose." *See Bartlett*, 168 F.3d at 712 ("a major purpose").

Washington's Disclosure Law. *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010).

HLW broadly asserts, without discussion, that five other circuit courts "recognize" "*the*" major purpose test. Pet. 19 and n.18 (citing decisions of the Second, Seventh, Tenth, Eleventh, and D.C. circuits). However, like the Ninth Circuit below, the majority of these circuit courts cite *Buckley's* "major purpose" analysis as a judicial construction to narrow what was an otherwise unconstitutional specific federal statutory definition of political committee. Pet. App. 34a-35a; *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995); *CRLC*, 498 F.3d at 1153; *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir. 1981), *certiorari denied*, 454 U.S. 897 (1981); *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010). These courts have not, as HLW implies, interpreted *Buckley* as a constitutional mandate that an entity must only have "*the* major purpose" of supporting or opposing an election in order to be regulated as a political committee.

HLW also cites to the Tenth Circuit in *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677 (10th Cir. 2010) ("*NMYO*"). Pet. 20. The *NMYO* court struck down a state law "as applied" to an organization that was deemed a political committee. *NMYO*, 611 F.3d at 677 & n.5. New Mexico argued that its $500 per year expenditure rule, standing alone, would prove an organization's major purpose. *Id.* at 677. In rejecting New Mexico's unique view of determining "major purpose," the Tenth Circuit did not endorse a rigid requirement of "*the*" major

purpose. It cites *Leake*, but merely for a broad proposition that, under *Buckley*, classification as a political committee should reflect major purposes, not an expenditure trigger like $500 per year. In light of the court's discussion and the fact-bound nature of the ruling, *NMYO* is not comparable to the decision below.

Finally, HLW argues that there is conflict within the Ninth Circuit. Pet. 32. This argument has no merit. The Ninth Circuit addresses and resolves prior circuit cases by adopting and following this Court's cases. Pet. App. 20a-25a. There is also no merit to HLW's claim that the court of appeals opinion here conflicts with its prior opinion in *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) (*"CPLC-II"*). Pet. at 20. *CPLC-II* specifically held that "irrespective of the major purpose of an organization, disclosure requirements may be imposed." Pet. App. at 34a (quoting *CPLC-II*, 507 F.3d at 1180 n.11).

HLW's claimed conflict with other circuits regarding the level of scrutiny and the major purpose analysis has no merit, and does not warrant review.

CONCLUSION

The petition for certiorari should be denied.

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In The
Supreme Court of the United States

Human Life of Washington, Inc., *Petitioner*

v.

Chair Bill Brumsickle et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Reasons to Grant the Petition

Washington demonstrates why campaign-finance jurisprudence is not working and the petition should be granted. Like the decision below, Washington would evade this Court's the-major-purpose test for political-committee ("PAC") status by conflating (1) simple, event-driven reports with onerous PAC-style burdens; (2) scrutiny appropriate to simple disclosure with scrutiny required for onerous PAC-style burdens; and (3) express advocacy with issue advocacy. *See* Part I. It disputes that the First Amendment requires brightline definitions to protect core political speech. *See Part II.*

I. When PAC-Status May Be Imposed Is an Important Federal Question With Conflicting Decisions.

HLW established that Washington's scheme for imposing PAC-status conflicts with decisions of this and other courts. Pet. 14-22. Washington admits it imposes PAC-status based on *a* primary purpose, not *the* major purpose, of an organization, both as to its "receiver of contributions prong" and "expenditure prong. Opp'n 2-3, 18.[1] But it alleges no conflict with decisions of this and other courts. Opp'n 18-21. It is wrong.

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[1] Washington says HLW did not challenge the contributions prong. Opp'n 18 n.8. Washington is wrong. *See, e.g.*, Compl. 10 ("HLW challenges Washington's manner of imposing PAC status . . . , which . . . involves . . . Washington's 'receiver of contributions' test" (¶ 42).); Br. of Appellant 2 (Issue "1. Whether Washington's 'political committee' definition . . . and its implementing . . . 'receiver of contributions' test[], are unconstitutional . . . ."). HLW argued that Washington may not impose PAC-status absent *Buckley*'s "the major purpose," *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), in *any* way.

A. The Decision Below and Washington's PAC-Status Scheme Conflict with this Court's "the Major Purpose" Test.

This Court's the-major-purpose test for determining whether PAC-status may be imposed is foundational to campaign-finance jurisprudence. *See* Pet. 14-19.

Washington dismisses the test in *Buckley*, 424 U.S. at 79, as merely a "narrowing construction . . . [of] the specific statutory definition of '*political committee*,'" not stating "an absolute limit on when a state may seek *disclosure* by an organization involved in support of or opposition to a ballot measure." Opp'n 19 (emphases added). Washington makes two errors.

First, Washington switches between simple *disclosure* and *PAC-status* as if they were interchangeable. They are not. In fact, *Buckley* itself was dealing with two types of disclosure—one for a "political committee" and another for "a group other than a 'political committee'"—when it created its "the major purpose" test. *Id.* at 79-80. *Buckley*'s the-major-purpose test and the express-advocacy test both protected issue advocacy and issue-advocacy groups, like HLW, in the disclosure context. *Id.* So just because government may require *disclosure* of an entity does not mean that it may impose onerous[2] *PAC-style* disclosure. Washington's

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[2] Washington claims its PAC-style burdens are "modest," not "onerous," "because no evidence supports HLW." Opp'n 17 n.7. Washington is wrong. They are "onerous" as a matter of law. *See Citizens United v. FEC*, 130 S.Ct. 876, 898 (2010) ("*Citizens*") ("onerous"); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 477 n.9 (2007) (Roberts, C.J., joined by Alito, J.) ("*WRTL-II*") ("PACs impose well-documented and onerous burdens, particularly on small nonprofits " (citing

conflation permeates its argument.

Second, *Buckley*'s "narrowing construction" was based on constitutional concerns and is directly relevant to the *current* political-committee definitions in both federal and Washington statutes. *Buckley* was construing a *disclosure* requirement for "expenditures" defined with vague "'for the purpose of . . . influencing' an election" language. 424 U.S. at 79 (citation omitted). It first considered its application to "political committees," defined as "'any . . . group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000." *Id.* at 70 (citation omitted). That is nearly identical to the current federal definition, *see* 2 U.S.C. 431(4), and Washington's definition (but for Washington's missing $1,000 trigger), *see* Wash. Rev. Code 42.17.020(39). The definitions being essentially identical, Washington may not dismiss *Buckley*'s the-major-purpose test as being for an irrelevant statute. The problem that *Buckley* identified was that "'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures,' and could be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79 (footnote omitted). The same problem exists with Washington's statute and its application to HLW's planned issue advocacy. *Buckley* does not say that a group must do *only* issue advocacy to avoid imposed PAC-status. Rather, *Buckley* looks to "the major purpose of nominating or electing candidates." *Id.* at 79. Given *Buckley*'s limitations on what

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FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 253-55 (1986) ("*MCFL*") (plurality opinion)). *See also* Pet. 19 (burdens deemed "onerous" in *Citizens* nearly identical to PAC burdens Washington imposes).

speech is constitutionally regulable, major purpose would be determined based only on independent expenditures for "express advocacy," *id.* at 43-44, 80, and contributions to candidates, both considered in relation to a group's total annual spending. Thus, Washington has failed to distinguish *Buckley* and its controlling "the major purpose" test.

Washington tries to distinguish this Court's reaffirmation in *MCFL*, 479 U.S. 238, of *Buckley*'s test. Opp'n 19. As it does throughout its brief, Washington dismisses the *analysis* as irrelevant because the case was distinguishable on some *factual* basis. But when this Court said the following, it surely did not expect its analysis could be brushed aside as irrelevant to PAC-status:

> In *Buckley* . . . , this Court said that an entity subject to regulation as a "political committee" under the Act is one that is either "under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate." . . . . It is undisputed on this record that MCFL fits neither of these descriptions. Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.

MCFL, 249 U.S. at 252 n.6 (plurality opinion) (citations omitted) (emphasis added). Nor did this Court likely think the following irrelevant to the permissible PAC-status standard:

> Should MCFL's independent spending become so extensive that *the organization's major purpose* may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley*, 424 U.S., at 79. As

> such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

MCFL, 249 U.S. at 262 (emphasis added). *See also id.* at 252 ("major purpose" test), 253 (plurality opinion) (same).

McConnell v. FEC, relied on this Court's "the major purpose" test as part of its analysis. 540 U.S. 93, 170 n.64 (2003), thereby implicitly reaffirming it. Washington says the decision below does not conflict with *McConnell* on this point, Opp'n 18, but fails to argue how this is so. *See* Opp'n 20 (turning to *McConnell* but changing the topic).

Washington's central argument is that everything changed with *Citizens*, 130 S.Ct. 876, and *Doe v. Reed*, 130 S.Ct. 2811 (2010). Opp'n 14-15, 26. But in neither case was *Buckley*'s the-major-purpose test at issue, part of the analysis, nor even mentioned. They could not have altered the test.

Moreover, *Citizens* expressly rejected a "[multi]-factor, balancing test" implementing its "objective" test, *Citizens*, 130 S.Ct. at 895, because such "onerous restrictions . . . function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws . . . that the First Amendment was drawn to prohibit," *id.* at 895-96. That forbidden approach is how Washington determines PAC-status. Opp'n 2-3 ("non-exhaustive list of analytical tools").

The only way that Washington can make the argument that *Citizens* somehow overruled these cases is by attempting the sleight-of-hand substitution of mere *disclosure* for *PAC-status*. By conflating them, Wash-

ington tries to force onerous PAC-status into the analysis of *Citizens*, which imposed exacting scrutiny on simple, event-driven electioneering-communication reporting. 130 S.Ct. at 913-14. *See also* Pet. 29-31. But PAC-status differs in kind from electioneering-communication reporting because it onerously regulates a *group*, based on its *nature*, not just some of its *activities*. And in considering whether the PAC-option adequately protected the First Amendment rights of corporations, *apart from the corporate prohibition*, *Citizens* applied strict scrutiny, 130 S.Ct. at 898, just as *MCFL*, 479 U.S. at 256, 260, and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 658 (1990), *overruled on other grounds*, *Citizens*, 130 S.Ct. at 913, applied strict scrutiny to imposed PAC status. *See* Pet. 26-32. *Citizens* only applied "exacting scrutiny" to electioneering-communication reporting. 130 S.Ct. at 913-14.

Washington attempts to draw the line for strict scrutiny at provisions that prohibit speech. Opp'n 15. But while the cases just discussed did involve corporate prohibitions on independent expenditures, the application of strict scrutiny did not turn on that. *Buckley* created its the-major-purpose test in the context of analyzing "expenditure" *disclosure*, not a corporate prohibition, and determined, without stating the level of scrutiny, that PAC-status could not constitutionally be imposed on groups engaged in issue advocacy who lacked "the major purpose of nominating or electing candidates." 424 U.S. at 79. So under *Buckley*, whatever the level of scrutiny, PAC status cannot be imposed on issue-advocacy groups like HLW.

MCFL dealt with corporations that were *not* prohibited from engaging in express-advocacy independent

expenditures because they did not fit the rationale for the corporate prohibition. *See* 479 U.S. at 263-64. The FEC argued that *if the corporate prohibition were inapplicable*, PAC-style regulation was necessary for *MCFL*-corporations to prevent "massive undisclosed political spending." *Id.* at 262. This Court required a "compelling state interest" in its analysis of the constitutionality of imposing *PAC-status* on such groups, *see id.* at 256, 260, *in addition to* its analysis of the *prohibition* itself, *see id.* at 262. And this Court required the less-restrictive means (a strict-scrutiny requirement) of simple, one-time activity reports instead of PAC-style reports to meet the state's *disclosure* needs: "The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act." *Id.*

And *Austin* directly contradicts Washington's attempt to restrict strict scrutiny to prohibitions. This Court specifically noted that it was dealing with the PAC-style burdens, *not* the prohibition, when it required strict scrutiny: "Although these requirements *do not stifle corporate speech entirely*, they do *burden* expressive activity. See MCFL, 479 U.S., at 252 (plurality opinion); id., at 266 (O'CONNOR, J.). Thus, they must be justified by a compelling state interest." *Austin*, 494 U.S. at 658 (emphases added).

This Court in *Davis v. FEC* held that even "exacting scrutiny" requires higher justification where burdens are higher. 128 S.Ct. 2759, 2775 (2008). Washington fails to even mention this case, instead creating the strawman argument that HLW proposes "a special standard based on the term 'onerous.'" Opp'n 17. Washington's argument that no court "uses an 'onerous'

standard," *id.*, fails to answer *Davis* and thus requires no further answer. *See* Pet. 30.

In sum, Washington fails to show that its PAC-status scheme and the decision below do not conflict with this Court's holdings and that strict scrutiny (or at least high exacting scrutiny) applies to imposed PAC-status.

B. The Decision Below and Washington's PAC-Status Scheme Conflict with Other Courts' Holdings.

Buckley's the-major-purpose test was clearly recognized by other courts and the Federal Election Commission. Pet. 18-22.[3]

The Fourth Circuit expressly held that this Court requires *the* major purpose, not *a* major purpose in its test for imposing PAC status. *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 287-89 (4th Cir. 2008); Pet. 20. The opinion below expressly recognized that it created a circuit split with the Fourth Circuit by holding that "a primary purpose" was enough. App. 34a; Pet. 20 n.19. But Washington claims no "genuine conflict" exists. Opp'n 26.

First, Washington argues no real conflict because "*Leake* pre-dates . . . *Citizens*" and the Ninth Circuit found *Leake* unpersuasive for that reason. Opp'n 26. That leaves the conflict. As shown above, neither

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[3] Washington says the FEC does not require *the* major purpose. Opp'n 19 n.9. Washington is wrong. *See* FEC, "Political Committee Status," 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) ("Not only must the organization have raised or spent $1000 in contributions or expenditures, but it must additionally have *the* major purpose of engaging in federal campaign activity." (emphasis added)).

Citizens nor *Doe* alters this Court's the-major-purpose test or its application of strict scrutiny to imposed PAC status and burdens. *See supra* at 5.

Second, Washington argues that *Leake* said that Washington's scheme was not flawed. Opp'n 26. But whatever the *Fourth Circuit* said about *Washington's scheme* (not about the decision below) cannot eliminate the clear conflict that the Ninth Circuit *acknowledged*. And simply consulting *Leake* reveals that *Leake*'s comment had nothing to do with this Court's the-major-purpose test because it was discussing vague definitions regulating speech. *See* 525 F.3d at 299.

Third, Washington argues that *Leake* relied on the absence of clear guidance on "'how to comply with the law.'" Opp'n 27 (quoting *Leake*, 525 F.3d at 289). And Washington argues that there are "no difficulties in complying with Washington's definition or its modest disclosure requirements." Opp'n 27. But *Leake* said that the vagueness of North Carolina's "a major purpose" test was equivalent to "'handing out speeding tickets without telling anyone the speed limit.'" 525 F.3d at 290 (citation omitted). Washington's *a*-primary-purpose test does the same. Any guidance Washington claims is not in its statutes and regulations, where it must be. And the PDC cannot even give formal, binding advisory opinions, *see* Opp'n 5 ("informal advisory opinions"), which in any event cannot alter the inherent vagueness of an *a*-primary-purpose test.

Washington has failed to eliminate the "genuine conflict" between the decision below and the Fourth Circuit on whether imposed PAC status must be based on this Court's *the*-major-purpose test, which conflict the Ninth Circuit itself acknowledged.

C. Washington's Efforts to Brand HLW a PAC Demonstrate Case Conflicts and Chill.

The decision below conflicts with this and other courts on how to determine "major purpose." The decisions of this and other courts say it is done by examining what an entity's organic documents create it to be and how much of its annual budget is spent on express-advocacy independent expenditures and regulable contributions. Pet. 22-26. The opinion below conflicted with this permissible scope by considering non-cognizable activity in an attempt to brand HLW a PAC. Pet. 15, 22.

Washington now compounds this error, saying it doesn't matter that the Ninth Circuit relied on a single 2008 email—which wouldn't even be deemed an "expenditure" under Washington's scheme—because it was "part of a larger record showing that HLW's primary purpose in 2008 would be *to expend funds to oppose I-1000*." Opp'n 21 n.11 (emphasis added). But the portions of the decision below to which Washington points do precisely what HLW said they do in trying to brand HLW a PAC, i.e., rely on what happened in *1991*, what HLW's *PAC* did, and that *single unregulated email* as the only example of express advocacy against I-1000. *See* Pet. 15, 22. This shows the deep chill of Washington's scheme and the way it is enforced and what the Ninth Circuit has permitted.

Fundamental to both the Ninth Circuit's and Washington's error is the necessity of distinguish[ing] issue advocacy from express advocacy. What HLW was chilled from doing was an *issue-advocacy* campaign against physician-assisted suicide. What it carefully avoided was a major purpose of *expressly advocating* against I-1000. Yet Washington and the decision below

constantly conflated them, e.g., the issue activity would equate with "*oppos[ing] I-1000*." Opp'n 21 n.11 (emphasis added). While issue advocacy may require disclosure (if a state passes a proper electioneering communication statute that would capture issue advocacy near initiative votes, which Washington has not), it should not count toward PAC status precisely because it is known to sweep in issue advocacy. *See WRTL-II*, 551 U.S. at 470 (principal opinion). Under the federal scheme, electioneering communications were not even included in the "expenditure" definition, *see* 2 U.S.C. 431(9), so they cannot be an "expenditure" that triggers PAC status. *See* 2 U.S.C. 431(4) (PAC definition). But *even if* all the issue advocacy that HLW wanted to do were counted toward PAC status, it still would not be HLW's major purpose because it would not exceed 50% (nor even 20%) of HLW's approximately $180,000 budget for 2008. Pet. 7.[4]

The decision below conflicts with decisions of this and other courts. And Washington's defense shows the chill on issue advocacy from such an ad-hoc approach.

II. Whether Speech Regulation Requires Brightline Standards Is an Important Federal Question with Conflicting Decisions.

HLW demonstrated that the decision below conflicts with decisions of this and other courts that require brightline standards for regulating core political speech. Pet. 32-34. Two Washington responses merit reply.

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[4] Washington says issue-advocacy expenditures might have reached $50,000. Opp'n 7. This is wrong but makes no difference because that would still not be HLW's major purpose.

First, Washington asserts that HLW insists that only magic-words express advocacy may be subjected to disclosure and notes that *Citizens* allowed disclosure as to all electioneering communications. Opp'n 23-24. But HLW's point is that *Buckley* required *brightline* tests for disclosure and that the electioneering-communication definition is bright, unlike Washington's vague and overbroad definitions.

Second, HLW said the decision below conflicts with *Leake*, which held that only two definitions of regulable contributions "str[ike the right] balance between the legislature's authority to regulate elections and the public's fundamental First Amendment right to engage in political speech," i.e., express-advocacy communications and federally defined electioneering communications. 525 F.3d at 284. Washington merely disputes without refuting this. Opp'n 27 n.13.[5]

The decision below conflicts with decisions of this and other courts. And Washington's defense shows the chill on issue advocacy from vague and overbroad definitions.

Conclusion

Granting the petition will allow correction on these issues of great importance to protecting core political speech. Otherwise, states will continue chilling speech by imposing onerous PAC-style burdens on groups not rightly PACs and regulating core political speech with vague and overbroad laws.

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[5] Washington says the provision challenged in Question 4 requires no reporting. Opp'n 5 n.3, 22 n.12. The regulation speaks for itself. Pet. 123a ("shall report").

Respectfully submitted,

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